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COPYRIGHT ARBITRATION ROYALTY PANEL

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HEARING

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ORIGINAL

In the matter of:

DISTRIBUTION OF 1993, 1994,
1995, 1996, AND 1997 CABLE
ROYALTY FUNDS

Docket No. 2000-2
CARP CD 93-97
Phase IIPS

Monday,
January 8, 2001

The hearing was held in Room 414 of the
Library of Congress' Madison Building,
101 Independence Avenue, S.E., Washington, D.C., at
9:30 a.m.

BEFORE:

THE HONORABLE DOROTHY K. CAMPBELL, Chairperson
THE HONORABLE JOHN W. COOLEY
THE HONORABLE MARK J. DAVIS

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Marsha E. Kessler

By Mr. Popham 121

Voir Dire by Mr. Lutzker on page 126

EXHIBIT NO.DESCRIPTIONMARK RECDMPAA

10	12-20-00 Letter	178
11	12-18-00 Letter from Paramount Pictures	184
12	Representation Agreements	191 193
13	11-04-99 Letter and Agreement	194
14	04-05-00 Memo	194

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P-R-O-C-E-E-D-I-N-G-S

(9:51 a.m.)

CHAIRPERSON CAMPBELL: The first order of business is to swear in the Court Reporter. And I don't know your name, sir.

THE COURT REPORTER: John Mongoven.

(Whereupon, the Court Reporter was sworn.)

CHAIRPERSON CAMPBELL: The second item, ladies and gentlemen, again, my name is Dorothy Campbell. To my right is John Cooley, and to my left is Mark Davis. I am the Chairperson of the Panel.

Pursuant to Rule 25146 of the Copyright Arbitration Royalty Panel rules and procedures, I am to announce the subject matter under consideration. This is CARP CD 93-97, Docket Number 2000-2, Phase Roman numeral IIPS.

This morning the very first thing we're going to do is run through a schedule as a scheduling order. We will have five days of hearing this week ending on Friday, and I want you to please consider communicating carefully with us with regard to any necessity of any additional time.

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1 If we need additional time, we would
2 prefer to do it by extending the hearing days in the
3 afternoon past the 4:30 time. That will allow us to
4 have a more consistent hearing. We realize Monday is
5 a national holiday. The idea of extending into Monday
6 is not suitable for that purpose and also not suitable
7 with regard to the hearing officers' schedules.

8 Mr. Davis will give us more detail on
9 current and upcoming hearing dates.

10 ARBITRATOR DAVIS: I just direct your
11 attention to the scheduling order issued in October in
12 this case. We have five days of opening arguments and
13 hearings on the direct cases, Monday through Friday
14 this week. Friday, January 26th, file rebuttal
15 testimony. Wednesday, January 31st, post-hearing
16 discovery requests.

17 Friday, February 2nd, responses to post-
18 hearing discovery requests. Monday, February 5th,
19 completion of document production. Tuesday, February
20 6th, and if necessary Wednesday, February 7th, oral
21 arguments on all motions regarding post-hearing
22 document production and discovery.

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1 Then, two weeks later, Tuesday,
2 February 20th, and if necessary Wednesday,
3 February 21st, rebuttal hearings. Friday, March 21st,
4 file your proposed findings of fact and conclusions of
5 law. Friday, March 9th -- March 2 -- Friday, March 2.
6 And Friday, March 9th, file the reply to proposed
7 findings of fact and conclusions of law.

8 The Panel would request that when you file
9 these proposed findings of fact and conclusions of law
10 that you file it with a floppy disk also, so we have
11 it in electronic format.

12 The last time we meet here is Friday, the
13 16th of March, for closing arguments. And a month
14 later, Monday, April 16th, the CARP decision is due.
15 The Panel has deliberately given itself a month to
16 write the decision, so we'd like to stick to this time
17 schedule very closely, and we appreciate your prior
18 efforts in sticking to it.

19 CHAIRPERSON CAMPBELL: All right. If
20 first parties will let me know who you have with you,
21 starting with Mr. Lutzker.

22 MR. LUTZKER: Thank you. My name is

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1 Arnold Lutzker, and I'm Counsel for the Independent
2 Producers Group. With me is Raul Galaz, who is
3 President of IPG. And my Legal Assistant, Maura
4 Shine, may appear as well in the room. And my
5 associate, Carl Settlemyer, may also appear. Neither
6 of them are here at the moment.

7 CHAIRPERSON CAMPBELL: Okay. Go ahead.

8 MR. POPHAM: Thank you. I'm Jim Popham.
9 I'm Vice President and Statutory License Counsel for
10 MPAA. With me today, you all know Mr. Olaniran of the
11 firm of Morrison & Hecker. My legal assistant, Jo
12 Popham. MPAA Vice President, Marsha Kessler, our
13 witness today.

14 CHAIRPERSON CAMPBELL: Will Mr. Galaz be
15 a witness?

16 MR. LUTZKER: Yes, Mr. Galaz will be a
17 witness.

18 CHAIRPERSON CAMPBELL: All right. Will
19 the two witnesses rise, please, starting with Mr.
20 Galaz, and then I will do Ms. Kessler.

21 (Whereupon, Raul Galaz and Marsha Kessler
22 were sworn.)

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1 CHAIRPERSON CAMPBELL: Now, both parties,
2 please, if you have other witnesses come in the room,
3 either today or any other day, please let us know at
4 the beginning of the hearing or at the beginning of
5 whatever break when they come in, so that we make sure
6 they are sworn and we don't overlook that element.

7 Are there any preliminary matters or
8 outstanding matters? There were some items to be
9 completed by January 8, and the CARP panelists wanted
10 to make sure that all of those matters were resolved.

11 Mr. Olaniran?

12 MR. OLANIRAN: Yes. I think we are
13 supposed to be receiving some discovery documents
14 today. I'm not sure what the status of that is.

15 CHAIRPERSON CAMPBELL: All right.

16 Mr. Lutzker?

17 MR. LUTZKER: Yes. I guess I have several
18 preliminary matters to address. First, with respect
19 to the order released last week, we will be providing
20 documents today, later today, to MPAA, as suggested by
21 the Panel. We are interpreting the orders of last
22 week, since they were -- there were no specific

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1 discovery requests propounded. Nevertheless, the
2 order was specific as regards to certain information.
3 We will be providing that as is available to MPAA.

4 Secondly, I'd like to address the
5 discovery that we received last week, which followed
6 the orders of the Panel several weeks prior to that,
7 the MPAA was obligated to provide essentially four
8 categories of information to us. And I just want to
9 address what we perceive as the open issue with
10 respect to that.

11 On January 4th, we received communication
12 from counsel for MPAA, including electronic
13 information and printed information. And this was
14 their attempt in response to the prior orders of this
15 Panel.

16 The information essentially broke out
17 into, if you will recall, four categories of data.
18 The first category were television data, TV Data
19 station logs, for the missing 48 stations that had
20 been ordered produced.

21 Prior to and following on the order of the
22 Panel, we requested that information be provided both

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1 in electronic and printed form in the event that given
2 the timeframe, the proximity to the hearing, one
3 business day before the hearing was to commence, that
4 if we had difficulty opening documents, as we
5 experienced before, that we would at least have a
6 printed document to work with.

7 Mr. Olaniran and I had several
8 conversations regarding the volume of material that
9 constituted printed records, and we attempted to reach
10 some agreement with respect to that material. As a
11 result, with respect to the TV Station logs, we agreed
12 not to receive printouts of that material which were
13 voluminous and indicated that we would work with the
14 electronic file which was provided.

15 Second, with respect to 1997
16 certifications and title listings, we received printed
17 certifications for some -- I'd say a substantial
18 majority, but not all of the claimants that they
19 represent. And, presumably, they provided -- my
20 assumption is they provided what they had, and that
21 would be a matter to be addressed at a later point.

22 The more critical issues with respect to

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1 why I'm raising this now relate to the Nielsen study
2 and the MPAA viewer study. We were provided -- with
3 respect to Nielsen, Mr. Olaniran and I had a
4 conversation in which I acknowledged at his sort of
5 inquiry that we had disks provided previously by MPAA
6 and also by CDC with respect to Nielsen data.

7 And I acknowledged we had those, and, in
8 fact, those were documents that were the subject of
9 some discussion early on about our ability to open
10 them. But eventually both those documents were
11 opened.

12 Despite our request, there was no hard
13 copy of any Nielsen material produced, and that's just
14 a statement. I mean, we didn't receive any physical
15 copy. We didn't receive, in addition -- and this is
16 perhaps the most critical aspect of our concern about
17 the Nielsen documents -- if you will recall, we had
18 specific discussions as an example of the underlying
19 assumptions with respect to the Nielsen data -- most
20 particularly, the number of households that were
21 involved in the study, the relationship of a household
22 to viewing hours, formulas associated with that, and

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1 any representations by Nielsen with regard to the
2 accuracy/inaccuracy of the data.

3 As we understand, and as has been the
4 subject of prior hearings before other CARP panels,
5 the issue of Nielsen data has been exhaustively
6 addressed. It is on the record in prior proceedings
7 that when Nielsen produces a report for a client under
8 consent decrees going back, which, again, are on the
9 record before the Panel -- prior panels -- they are
10 required to provide information regarding errors,
11 their statistical analysis, error factors, and the
12 like.

13 As far as we can tell, in all the data
14 that have been provided to us, we have none of that.
15 We feel that, obviously, these are critical elements
16 of any Nielsen study. They are inherent in a Nielsen
17 study. And we express our, you know, severe concern
18 that analysis of the Nielsen data is inherently
19 prejudiced by the absence of that information.

20 We don't know -- there's no correspondence
21 between MPAA and Nielsen, either electronically or
22 orally, since the order was written. There are one or

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1 two letters from Ms. Kessler to people at Nielsen that
2 have been previously provided, going back to 1999.

3 But with respect to the specific inquiries
4 and coming out of the data -- coming out of the prior
5 CARP rulings, we have no information. And, therefore,
6 we again raise the concern about the Nielsen study.
7 Pursuant to the order, we renew our concern as was
8 expressed in our prior proceeding documentation and in
9 your order that we should raise this and you would
10 consider the implications of this in terms of motions
11 to strike.

12 In addition, with regard to what we
13 characterize as the MPAA viewer study, and in
14 correspondence from counsel to us there is some -- I
15 won't call it a dispute per se, but, I mean, there is
16 -- their position is there is no document entitled
17 "MPAA Viewer Study."

18 Our position is we know it -- we know of
19 what we're talking. We're talking of the work
20 performed on behalf of the MPAA by CDC in taking
21 Nielsen data that it receives, and taking TV Data data
22 that it receives, interpolating it, and producing

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1 detailed analysis that go into the essence of their
2 case.

3 We were provided for the first time
4 certain electronic files with respect to this
5 material. However, again, we feel that there were
6 several critical gaps in the material that were
7 provided. First and foremost, we specifically asked
8 for an electronic copy of the -- what has been
9 identified in the record as the alpha list, the 1997
10 listing of programs, owners, and viewing hours.

11 And, indeed, in preparation for this
12 hearing, we received an amended alpha list prepared
13 and filed -- prepared and served on us in printed
14 form. We have not received any electronic version of
15 that material.

16 And where we are, shall I say, at odds
17 with the MPAA's compliance with the order to provide
18 the underlying documentation, we believe that the
19 ability to provide an electronic version of the alpha
20 list is not rocket science.

21 This is obviously data that is pulled from
22 the larger universe. We have attempted to replicate

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1 that at the expenditure of great amounts of time in
2 this precious period between Thursday evening and
3 today when we received the information.

4 And I'll add parenthetically -- and for
5 this I will not cast any stones -- I mean, we received
6 electronic files on the 4th, which apparently -- on
7 this MPAA study which were apparently incomplete.
8 They did not contain any viewing data. And on the 5th
9 we received a separate disk that provided that.

10 Nevertheless, the ability of IPG to
11 coalesce this material replicated was severely
12 hampered by the absence of an electronic version of
13 the alpha list.

14 In addition, there is documentation that
15 has been provided separately by CDC with respect to an
16 interpolation analysis that they performed. However,
17 again, the documentation that we have been provided
18 has critical gaps. And as one moves from the Nielsen
19 data, which, again, lacks our ability to make
20 determinations as to how many households were
21 involved, what is the ratio of the households to a
22 viewing hour, and so forth.

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1 Similarly, in the MPAA study material that
2 has been provided, there are critical gaps as to how
3 interpolations are derived. We have the results of
4 the interpolation computations, but we lack the
5 intervening programming conclusions that are necessary
6 to form a judgment about the results that we've been
7 provided.

8 We believe that this material is resident
9 at CDC, is resident with the -- under the instructions
10 of MPAA, which controls all of this data. There is
11 other documents that have previously been filed in
12 this case that indicate that CDC doesn't release data
13 unless authorized by MPAA.

14 So we know that MPAA has control of this
15 documentation, and yet to date we still have not
16 received what we believe to be necessary, critical,
17 useful information that will enable us to evaluate
18 this, and to present you, as members of this CARP, our
19 analysis of that information.

20 We are, in a sense, forced to accept the
21 conclusions drawn without having the underlying data
22 which enables us to verify those conclusions,

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1 challenge those conclusions, reflect on those
2 conclusions. And so as a result of that, in addition
3 to the Nielsen study, we renew our concern and
4 objection about the MPAA viewer study.

5 CHAIRPERSON CAMPBELL: Mr. Popham?

6 MR. POPHAM: Let me speak first and
7 clarify a matter, so that there is not confusion. We
8 are in the process today of transition. Wise or
9 unwisely, in the summer MPAA determined to take the
10 matter of royalty litigation and negotiation in-house.

11 I was chosen to undertake that position as
12 in-house counsel. And had this panel proceeded much
13 earlier on perhaps Mr. Tucci and Mr. Olaniran would
14 have been here, and I would have been watching. But
15 since we're into January, and it's my job, I am here
16 as primary counsel for MPAA today.

17 Having said that, Mr. Olaniran is
18 obviously here as well by virtue of his knowledge of
19 the history of this, and we certainly will make every
20 effort to avoid any double teaming.

21 So I'm going to just make one very
22 preliminary response to what Mr. Lutzker has said and

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1 leave the remaining discussion to Mr. Olaniran, who
2 has worked much more closely with this than I have.

3 Let me just say that we certainly took
4 your order very seriously to produce all these
5 documents. We urged and insisted that the people at
6 CDC do as well. And I believe we all have worked very
7 hard to provide the information that you have
8 requested us to provide.

9 Having said that, moving into the details
10 of the matter, I would again defer to Mr. Olaniran.

11 MR. OLANIRAN: Thank you, Jim.

12 Good morning, Your Honors. I'm going to
13 try to address Mr. Lutzker's issues I guess one by
14 one. We are in agreement as to the TV Data data. Mr.
15 Lutzker and I spoke last week, and he informed me that
16 they did not wish to have hard copies of the data, so
17 I don't think any dispute exists as to the TV Data
18 data they were asked to produce.

19 As to the certifications and the statement
20 of titles, I'm finding out for the first time here
21 that there were some that are missing. We spoke
22 several times between Thursday and Friday, and I was

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1 not informed that there were documents that are
2 missing. If they would identify those documents,
3 maybe we would make an attempt to either produce them
4 or explain why they are not part of the documents that
5 were produced.

6 As to the Nielsen data, Mr. Lutzker is
7 correct that we did speak last week, and I was under
8 the impression that we had already produced the
9 Nielsen data. The issue with respect to the Nielsen
10 data, I thought, was whether or not we were required
11 to produce the underlying data the Nielsen Company
12 used. We've given everything that we've had.

13 I thought the issue that we were
14 attempting to address at oral argument was whether or
15 not we were required to give something beyond what we
16 had in our possession; for example, whatever household
17 -- particulars about the households that Nielsen
18 surveyed. I thought that was the issue, and I did not
19 interpret it -- I did not interpret the order as -- or
20 we did not interpret the order as requiring us to
21 produce that.

22 And I might add, as I pointed out in oral

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1 arguments, in those proceedings that Nielsen -- that
2 parties were required to produce those sort of
3 underlying data. I think I pointed out that in those
4 proceedings the Nielsen study was actually put into
5 evidence. And I also explained that we did not put
6 the Nielsen study into evidence. But as far as the
7 Nielsen data goes, as Mr. Lutzker said, we produced
8 those documents.

9 It is true that we did not produce a hard
10 copy of the Nielsen data. And, frankly, I thought
11 after I talked to Mr. Lutzker that he didn't require
12 it. And once he told me that they had those
13 documents, it didn't occur to me that they needed
14 that. So that was an oversight on my part.

15 I'm not sure what kind of issue we would
16 have had with respect to printing them, but certainly
17 I didn't think that he wanted -- and that was the only
18 reason that we never discussed the issue.

19 With respect to the MPAA viewer study,
20 again, as Jim mentioned, CDC has been hard at work
21 since the order came out in trying to produce this
22 data. It is a massive amount of data, and this is the

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1 first time they've actually ever had to produce it
2 outside -- as far as I know, in the history of these
3 proceedings -- produce this sort of data outside of
4 CDC itself. But, nevertheless, we insisted that they
5 produce these documents.

6 What we produced on Friday, we produced a
7 hard copy of the alpha list and a CD-ROM that had the
8 CDC database, which I think is being referred to as
9 the MPAA viewer study. But it, in fact, is an
10 integration of all of the different data elements --
11 TV Data data, the Nielsen data, the program ownership
12 information. And basically it's an integration of all
13 of the data, including interpolated data. And we put
14 this on disk.

15 It's true, as Mr. Lutzker said, that there
16 was information missing on it, but that was only with
17 regard to the viewing hours. The very next day we
18 were produced another disk that added the viewing
19 hours. However, on Thursday, we did produce the alpha
20 lists in hard copy, which had the viewing hours on it.

21 As far as a hard copy, the alpha list --
22 as I explained I think when Mr. Lutzker and I were

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1 speaking on Friday, the alpha list does not exist in
2 electronic form. The alpha list is essentially an
3 extract of the CDC database, and we've explained this
4 for nearly four or five months now -- that this is the
5 case.

6 And that's why the alpha list -- and I
7 think I pointed out in my letter to Mr. Lutzker that
8 the alpha list is an extract of that database, and
9 they now have a copy of the database.

10 As far as the viewing information not
11 being included in the electronic disk that was first
12 produced, we had Mr. Larson, who I believe is the
13 principal at CDC, Mr. Lutzker, Mr. Galaz, and I were
14 on the phone talking on Friday morning. And he
15 explained to them that that was basically his
16 oversight.

17 There is no question in my mind that CDC
18 bent over backwards to try to get this information to
19 them. As a matter of fact, about a week before we
20 were required to produce this information, Mr. Larson
21 himself called both Mr. Lutzker and Mr. Galaz seeking
22 technical information on how the data should be

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1 produced.

2 He never received a call back, and it was
3 -- when it was getting close to the time to produce
4 the documents, he and I had a conversation, and he
5 basically did the best he could under the
6 circumstances. And when the issues arose on Friday
7 morning, all four of us -- or the two of us -- at
8 various times, various points during that day were in
9 conversation trying to get the documents produced.

10 And as a matter of fact, one of Mr.
11 Larson's employees was at home with a sick child, and
12 she was also on the phone talking to both Mr. Larson
13 and I think at some point to either Mr. Galaz or Mr.
14 Lutzker. So there is -- I mean, there is -- I say
15 that only to say that there certainly is nothing
16 sinister going on. And we have made every attempt to
17 produce all of the documents that we were required to
18 produce.

19 There seems to be I guess some confusion
20 of the issues as to whether or not we are producing
21 all of the data. The CDC database is the CDC
22 database. It has always been available at CDC to IPG

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1 if they had wished to use it.

2 This is the first time we had to put it on
3 disk, and we made every effort to do that. I know
4 that they had some problems last week opening one of
5 the disks, and CDC did everything they could to help
6 them to do that.

7 So when Mr. Lutzker says that they don't
8 have this information, again, I don't -- I'm not quite
9 clear what information they don't have. I mean,
10 certainly, if there was -- they wanted to go to CDC,
11 which has been done in the past, where parties could
12 go to CDC and inspect the data right there at CDC.
13 They could have done that.

14 But, again, the database was produced, and
15 the only information that was missing on Thursday
16 evening when we produced it -- we produced it to them
17 on Thursday morning. We started producing hard copies
18 of the database. We were 4,000 pages deep when Mr.
19 Lutzker said we should stop.

20 I talked to him earlier in the week and I
21 said, "This is going to run quite a few thousand
22 pages." He ordered us to go ahead and produce it. We

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1 started producing them. We had printed about 3,000
2 that we shipped over to them on Friday, and he said --
3 and later on in the day he said, "Well, don't worry
4 about it. Stop producing them."

5 So, I mean, I'm not sure exactly what the
6 issue now as -- as what exactly they said that they
7 don't have. I mean, all of the information that we
8 have, either available in electronic form at CDC or --
9 we have attempted to produce on disk to them.

10 CHAIRPERSON CAMPBELL: For the record, Mr.
11 Olaniran, where is CDC located, please?

12 MR. OLANIRAN: I believe they're in
13 Rockville, Maryland.

14 CHAIRPERSON CAMPBELL: Bethesda?

15 MR. OLANIRAN: Bethesda? I'm sorry.

16 CHAIRPERSON CAMPBELL: Mr. Olaniran, did
17 you have more comments?

18 MR. OLANIRAN: No, I don't have. Not
19 right now. Thank you.

20 CHAIRPERSON CAMPBELL: Not at the moment?

21 Mr. Lutzker, do you want to respond?

22 MR. LUTZKER: Sure. A couple of things.

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1 First, with respect to the certifications that we
2 received or didn't receive, again, I humbly would
3 suggest that it's not my responsibility to alert my
4 esteemed colleagues. I mean, they provided what they
5 provided. I accept it as it is. I don't question it.
6 It's a document.

7 If there are documents missing that they
8 have, then there may be consequences from that. If
9 there are documents that are missing because they
10 don't have it, they can't produce -- my assumption is
11 they don't -- they produced everything they had to
12 produce according to the order with respect to
13 certification.

14 With respect to the Nielsen study, this is
15 -- I'm sort of -- I'm more troubled by my colleague's
16 sort of analysis of that, because I interpreted your
17 ruling very clearly and simply on pages 7 and 8 when
18 you were addressing the Nielsen study.

19 You will recall that we specifically --
20 and I use this as just one of the critical bits of
21 information that we don't have -- indicated that the
22 number of persons involved in the survey was of

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1 concern to us, because clearly we're dealing with a
2 subset of a universe of data produced by Nielsen under
3 certain sets of conditions, given certain sets of
4 understanding by the broadcast, cable, and programming
5 and advertising and industry.

6 And now they are -- our position --
7 commissioned by MPAA to produce a study narrowly
8 focused. And I think in past proceedings this has
9 been less of an issue because, as Mr. Olaniran
10 suggested, a document, a physical document entitled
11 "MPAA Study" was physically deposited with the Panel.
12 Ms. Kessler has produced it as an exhibit in the 1990
13 proceeding, 1989 proceeding. And these are documents
14 that Nielsen delivers to them.

15 Now, it may be in the age of electronics
16 that things are done sort of in a different fashion,
17 but we understood your ruling to be very clear that
18 they were required to produce a complete and
19 comprehensive copy of the Nielsen special study, which
20 they suggest that they have done in this electronic
21 format. And here's the critical language -- along
22 with all of the underlying sources of information.

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1 Now, the underlying sources of
2 information, as we conclude, must contain information:
3 a) regarding the households, because, I mean, these
4 are -- this is data that is taken in the broadcast
5 environment. They are asking now to preselect out
6 cable homes, distant viewing, 82 stations.

7 There's a subset of a universe in terms of
8 homes involved that must be analyzed. And you did
9 offer at that point that we could ask for copies in
10 hard copy as well as electronic copy, which we did.
11 And, again, I think with respect to the disks that
12 were provided earlier in June through September,
13 clearly I did not ask Mr. Olaniran for hard copies of
14 that material, but any new material that would be
15 provided.

16 But nothing was forthcoming because I --
17 my sense is, and Mr. Olaniran can respond to this --
18 my sense is they didn't go back to Nielsen and say,
19 "Give us sort of underlying sources of information."
20 They may have dealt with Mr. Larson at CDC, but I
21 haven't heard that they made any attempt to get
22 underlying sources of information from Nielsen, which

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1 historically in this proceeding has been part of
2 Phase I.

3 Now, one of the things to appreciate, we
4 have short-circuited the more traditional CARP
5 process, where a Phase I proceeding lays out a whole
6 host of this type of information, makes it available
7 in large category forms before we get to the
8 particularities of program-by-program analysis.

9 Failing that Phase I proceeding -- and
10 there has not been a Phase I proceeding involving the
11 cable industry revenues since the 1992 proceeding, so
12 there's a five-year gap in methodology, in collection
13 of information, in number of households, in stations
14 that are in and out of a survey. I mean, there are
15 material changes that occur from year to year, much
16 less from five years to five years.

17 The underlying data clearly was something
18 that we felt should have been provided and wasn't.

19 Secondly, with respect to the MPAA viewer
20 study, again, we had sort of a fundamental dispute.
21 And what -- I've worked with Mr. Galaz, who has become
22 I'd say quite expert in sort of trying to work through

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1 a lot of this electronic material, and the like. And
2 I've sat by him as he has tried to analyze this
3 material as we sort of go through this process.

4 I would add parenthetically that on
5 December 27th, in response to the order, Mr. Galaz
6 sent a note, sent a letter outlining the preferred
7 mechanism for delivery of the discovery documentation,
8 and included in that letter was a request that the
9 documentation be put in a Microsoft Access format,
10 which is accessible under his machinery. It's an
11 over-the-counter software.

12 In fairness to -- you know, and, again,
13 I'm not going to throw stones at this because
14 eventually it's a lot more cumbersome to deal with it.
15 We didn't receive it in a Microsoft Access format. We
16 received it in a different format. The conversion
17 process that takes place was, from our perspective,
18 more complicated than it should have been. And in
19 addition to losing time, there were things that may
20 have happened with the data that we find somewhat
21 unpredictable.

22 As an example, we -- and I'll sort of go,

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1 parenthetically, back again. On the alpha list -- as
2 I said, I've sat with Mr. Galaz as he goes through and
3 takes the Nielsen and MPAA electronic data. You ask
4 certain queries in the format that you have, and the
5 query would be a combination of the information which
6 would presumably result in an alpha list.

7 That's a file. Once it is created, it
8 becomes a file within the documentation of the MPAA
9 study. That file can be saved. It can be put on a
10 separate disk. It can be e-mailed. It can be
11 transmitted in any sort of format. To say that it is
12 impossible, difficult, complex to do, the answer is
13 it's not. It's easy to do. If you've done it, if
14 you've created -- and I've got the document -- they've
15 created a 116-page document with five columns, 50
16 lines a page.

17 You have that information sorted. You
18 save it to a file. It may be saved to a file now. I
19 don't know. But we just asked for it in electronic
20 form; we didn't receive it.

21 We did -- this is -- Mr. Olaniran is
22 correct, and this was -- I didn't realize the

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1 dimensions of the task, and I certainly tried to
2 cooperate with him during the course of producing
3 this. I said, "In light of our history of having
4 problems of opening material, in light of the
5 timeframe, we want to have a hard copy of the
6 underlying material."

7 Greg had called and indicated it would be
8 thousands, if not tens of thousands, of pages of data.
9 Tom Larson placed a voice message to me pleading with
10 me that we wouldn't kill so many trees in the process
11 of producing something that was not necessarily going
12 to be used.

13 I want to help them. I don't want to turn
14 this into -- because I don't have room in my office to
15 store all this stuff, okay? So I said, "Well, let's
16 start the process." They started the process. They
17 sent us this. They sent us, actually, I think two
18 more volumes of perhaps equal length.

19 I said at that point, not initially when
20 we got this, but a day or two later as we were going
21 through it, we were able to access the material, I
22 said, "Stop," you know, "I have enough that I can sort

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1 of understand." I need to grasp it. I'm a child of
2 the print age, and I like to have things on paper. I
3 can work electronically as well, but seeing things on
4 a piece of paper is helpful.

5 And providing this -- it was a -- you
6 know, perhaps a burden on MPAA. We appreciate what
7 they did produce. But we reached an agreement with
8 respect to that.

9 This data, then, is the type of data --
10 this represents maybe 10 stations of their collection.
11 This is the type of data that we are trying to
12 analyze. That's why electronic formats are critical,
13 but that's also why you need to be able to print it
14 out and physically see it.

15 Now, I'd like to do one thing in terms of
16 diagramming what our problem is with respect to the
17 data that's been provided, because I think in some
18 ways it's hard to sort of visualize this stuff.

19 MR. POPHAM: I'd like the record to
20 reflect Mr. Lutzker is using MPAA's easel. We're
21 happy for you to do it.

22 MR. LUTZKER: I appreciate that. I could

1 make a photocopy of Mr. Galaz's diagram here, but I
2 will do it this way and for the audience.

3 CHAIRPERSON CAMPBELL: One question. Can
4 you all see? You might want to adjust it slightly, so
5 that it's a bit more recognizable. And I would think
6 that that will go into the record when you're
7 finished, so there is a copy in the record.

8 MR. LUTZKER: Absolutely.

9 CHAIRPERSON CAMPBELL: Okay.

10 MR. LUTZKER: Absolutely. All right. So
11 we start with a box of -- we'll call it TV Data. And
12 this has been provided in electronic format to us.
13 Okay? We have no dispute. Okay.

14 We now have a box that we'll call Nielsen
15 data. Now, my understanding -- and, again, since it's
16 not my material, it's their material, this is material
17 that they have generated -- their position is we were
18 provided the disks of this data that -- in electronic
19 format sometime between June and September.

20 Now, this data, however, is generated by
21 diaries, by diary information. And it is this data,
22 the diary data, how many diaries, how many responses,

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1 how -- where are they located -- that Nielsen has.
2 They obviously have this information. It's
3 computerized and available to them.

4 We requested that information numerous
5 times. We had orders to compel the data. We had
6 disputes with respect to, does MPAA physically have
7 this data? I accept the position they don't
8 physically have it. But their agent, their
9 commissioned entity -- Nielsen -- had this data, and
10 that is what your order asked to be provided to us.
11 That has not been provided.

12 Another set of information are what we'll
13 call the CDC interpolations. We have been provided
14 interpolations from CDC, both summary information and
15 Tom Larson e-mailed material over the weekend, late
16 Friday, that constitutes I believe raw data for --
17 some of his raw data that moves to create his
18 interpolation.

19 However, those interpolations are
20 predicated upon some metered analysis, which is
21 presumably provided via Nielsen, or some other source
22 that we don't have. Now, this data is combined in

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1 some fashion, we believe, and we believe the fashion
2 in which it is combined remains unknown to us at this
3 moment.

4 We then move to a portion of -- a portion
5 of the CDC database which has been provided to us in
6 an electronic format and is defined as EQ1997IN. And
7 I'll leave it to, you know, further examination
8 exactly what that means.

9 But that is the electronic format of this
10 big volume that was provided, and it appears to be the
11 combination of TV Data information, Nielsen
12 interpolations in some fashion -- it's maybe a
13 selected sample -- that provides the units of quarter
14 hours of viewing or half hours of -- actually, program
15 time together with some plot summaries that are
16 provided, together with information regarding
17 ownership, information regarding MPAA representation,
18 yes or no, and whether they are claimants, and viewing
19 hours.

20 How this disk obtains ownership
21 information as an example, just one example, is
22 unknown to us. Where does the data come for ownership

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1 with respect to particular programs?

2 This data then gets translated into
3 another format, which we'll call a program, and it's
4 a query of question which becomes a selective
5 resolution of a certain set of instructions that will
6 enable the development of what we're now calling the
7 alpha list.

8 Okay. You don't get from here to the
9 alpha list automatically. You do things. You have
10 specific functioning inquiries. You create a file
11 which then produces an alpha list. This document we
12 also don't have.

13 So where we are is we have received -- and
14 in deference to what has been received, we have
15 received a lot of electronic information, more than
16 has ever been produced I will acknowledge, not only in
17 any Phase II proceeding but perhaps in any Phase I
18 proceeding.

19 As has been disclosed before, certain
20 information regarding ownership, certain information
21 regarding interpolations, has never been on the table
22 as I understand it. I may be wrong about this, but as

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1 I understand it it has never been on the table.

2 So I respect the fact that a lot of
3 material has been produced. But by failing to produce
4 all of the material that was asked for, that was
5 compelled, and that was required by the CARP, we are
6 left with gaps. And the gaps go to the fundamental
7 veracity and utility of the information we are going
8 to be analyzing in this proceeding.

9 As a result of that, we are in a flawed
10 position, and we turn back to the CARP in light of
11 this. Now, we don't feel -- I mean, we are novices to
12 this whole process. This is what we've learned as a
13 result of the last few months working with this. MPAA
14 has had this process for, as they acknowledged, 17 to
15 20 years, of working with Nielsen, of working with
16 Larson, of working with this data.

17 I feel a little bit like a Sherlock
18 Holmes. We're trying to come up with the clues and
19 information to understand what is behind this whole
20 process. We've gotten a good part of the way, but we
21 haven't gotten the whole part of the way. With the
22 CARP's instructions, we understood we were going to

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1 get the whole way. We were going to get enough
2 information that we could analyze the credibility on
3 a program-by-program basis, because that's what this
4 proceeding is about.

5 Phase I doesn't deal with program by
6 program. This proceeding does a program-by-program
7 analysis. And as a result of that, we are left with
8 critical gaps of information that we understood very
9 clearly were required by the CARP panel. And as a
10 result, we return to our request, our motion to strike
11 those portions of the MPAA case that rely upon the
12 documentation from Nielsen and the MPAA viewer study.

13 ARBITRATOR COOLEY: Can I ask a question?

14 MR. LUTZKER: Sure.

15 ARBITRATOR COOLEY: Could you summarize,
16 while you're still there --

17 MR. LUTZKER: Sure.

18 ARBITRATOR COOLEY: -- by bullet point
19 presentation, exactly what you are asking for at this
20 time, even using that diagram.

21 MR. LUTZKER: Fine. I mean, we want to
22 know here -- because, I mean, the diaries -- the

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1 information about how many diaries are used, Nielsen
2 in the sweeps -- I'll use round numbers. They have --
3 100,000 diaries are sent out in a given sweep month,
4 which is roughly 25,000 diaries nationally. Okay?

5 The cable universe is a fraction of that.
6 The number of diaries that are returned is a fraction
7 of that. The number of stations involved is a
8 fraction of that. We want to know how many diaries,
9 where those diaries were located, so that we can sort
10 of have a sense geographically, because programming is
11 carried on some stations and not on others, and
12 certain information, as a result of judging the
13 viewing -- I mean, there's a determination made in the
14 MPAA case that this is the viewing nationally on cable
15 on a distant basis of programs.

16 So if we don't have diary information,
17 which is available to Nielsen and available to MPAA
18 for the asking -- if they didn't ask for it, it's
19 still their study and they're allowed to ask for it --
20 where the households were, how many households were
21 involved.

22 In addition, and this is absolutely

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1 critical, every study that Nielsen does that has the
2 Nielsen stamp on it, must have information regarding
3 the error factors and statistical deviations
4 associated with that data. And we need that. Okay.

5 ARBITRATOR COOLEY: Now, does that cover
6 diaries? That portion of your chart there, your
7 illustration.

8 MR. LUTZKER: Yes.

9 ARBITRATOR COOLEY: Okay.

10 MR. LUTZKER: Okay?

11 ARBITRATOR COOLEY: Now, is this
12 information -- if you know, is this information in
13 hard copy, or is it in electronic form, or what is
14 your perception of it?

15 MR. LUTZKER: Well, in the past, I
16 understood Nielsen delivers a report to MPAA which is
17 entered into the record. So it's a hard copy report.
18 It may also be in electronic format.

19 This data I'm confident exists in an
20 electronic format, because Nielsen -- it's the stuff
21 from which Nielsen's conclusions -- we have the
22 conclusions. We don't have the underlying data. So

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1 there's -- we have the conclusions in electronic
2 format. I assume the data exists in electronic
3 format. Whether it was reduced to hard copy in this
4 day and age, I don't know.

5 ARBITRATOR COOLEY: And you're requesting
6 it in electronic format. I'm just trying to find out
7 what you're asking for and how -- in what format.

8 MR. LUTZKER: Right. Well, accessible
9 electronic format. That's what we had asked for.
10 Okay?

11 Now, in terms of the CDC interpolations,
12 Nielsen measures four months a year in their diaries.
13 MPAA in this proceeding projects to 12 months. It
14 makes its projections according to a complicated
15 formula developed I'm not sure by whom but certainly
16 administered by CDC.

17 The formula involves certain estimations
18 of viewing, not to particular programs but to
19 particular program time periods, so that 9:00 a.m. to
20 9:15 has a certain rating according to Nielsen with
21 respect to a particular program and a particular day
22 of the year.

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1 Now, Nielsen doesn't measure in the diary
2 but for four months, and in some markets they measure
3 six months. The rest of the year Nielsen measures 24
4 months -- 12 months a year it measures in a metered
5 format.

6 I'm not sure exactly what information is
7 provided CDC, but some information is provided CDC
8 that enables CDC to make complex interpolations of
9 ratings information which they then use to
10 substantiate gaps in information with respect to
11 particular programs. So that if a show is running in
12 June, June 5th at 2:00 on WXIX, that's the program.
13 There's no ratings information that anybody has.

14 CDC will produce interpolations that will
15 give a guesstimate as to that particular show. That's
16 the way I'm interpreting it. We feel that's critical
17 information. We feel that information is derived from
18 the interpolations, which is derived from prior
19 information not provided to us. That information is
20 either resident with Nielsen -- it is certainly
21 resident with CDC because CDC makes that analysis.

22 Again, this information -- so exactly --

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1 you know, my assumption is it's available in
2 electronic and probably paper form, too. But it's
3 probably -- it's a unique study. I mean, the
4 additional difficulty that we're dealing with is we're
5 dealing with a unique set of stations with a unique
6 universe of distant subscribers.

7 So Nielsen is measuring TV households.
8 They have to sort of -- which is the material that
9 they sell. They have to sort of rummage through their
10 data to come up with a more particularized set of
11 information, and that's -- I don't know whether that
12 would exist in electronic format only. It certainly
13 would exist in electronic format.

14 That information is then merged with
15 probably something else. I mean, I put it over here,
16 but there has been past reference to BIB data. There
17 has been past reference to perhaps some other
18 documentations that relate to ownership information
19 that relate to data in this -- what we call the viewer
20 study that may come from elsewhere.

21 If this is all -- if this is the full
22 source of information, then, you know, I stand

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1 corrected. But there is a number in the alpha list,
2 which we have pointed to before very specifically.
3 It's a five-digit BIB code number. We were given BIB
4 books by MPAA, and the BIB books contain a six-digit
5 BIB code number. Okay? That's an issue that we
6 pointed to.

7 There is some information that ends up
8 here that comes not from any of these three sources.
9 And, again, that data we've not been provided.

10 As we end up with the alpha list, as I
11 said, this missing link is in fact a program, a set of
12 instructions, a set of information, that can be
13 preserve electronically. We have a hard copy of it,
14 but replicating it, testing it, evaluating it, has
15 proven at this point, if not impossible, then not
16 possible within the time period that we're working,
17 under the time constraints.

18 To say that this doesn't exist is
19 something -- I mean, Mr. Larson is not a witness in
20 this proceeding. But I would be surprised, based on
21 just my own observations, working with Mr. Galaz with
22 this same database, we would set a query and I'd say,

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1 "Hey, save that." You know, we want to do some sort
2 of summation of information, so we just sort of save
3 the query. We've got the information. We've got the
4 results.

5 If he could produce it, we could save it.
6 We haven't been able to reproduce it in the format
7 that they've got it.

8 Go ahead.

9 ARBITRATOR COOLEY: Do I understand you to
10 say that you would be happy receiving this information
11 in an accessible electronic format only?

12 MR. LUTZKER: I think we were -- under
13 orders of the Copyright Office and the Panel, we were
14 supposed to receive it in electronic and hard copy.
15 We would have been happy to have received it prior to
16 the commencement of the proceeding in electronic
17 format that's accessible that we can work with, in
18 hard copy if necessary.

19 ARBITRATOR COOLEY: The only reason I ask
20 that is that I believe they did start producing,
21 apparently, thousands of pages in hard copy, and then
22 that was stopped.

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1 MR. LUTZKER: No. The thousands of pages
2 they produced was this.

3 ARBITRATOR COOLEY: Okay.

4 MR. LUTZKER: This file. Because this is
5 what I'll call sort of -- it's not -- this is an
6 essential ingredient. Without this you can't make the
7 souffle. Okay? You must have this. Okay?

8 I was concerned, based on our track
9 record, that if we get a document in electronic form
10 on Thursday, the 4th, and the hearing begins Monday,
11 the 8th, that we're not going to be able to open it,
12 I didn't know how big it was, I didn't know what
13 capacity it was, I didn't know what format, even
14 though we had requested Access.

15 And there are conversion tables within
16 Microsoft Access that allows you to take other
17 formatted material and convert it to Microsoft Access,
18 and that's what we ended up having to do. Although it
19 was a difficult process, it could have been
20 accelerated. But I was just worried about getting
21 that in a useable format.

22 If I knew I had it in electronic format

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1 that I could use, I would not have asked for the
2 books. I asked for the books as a backup. When I was
3 satisfied that we had sufficient access to the
4 material electronically, I said, you know, stop.
5 Plus, I had enough of the books that I could work with
6 them sort of -- as sort of just, you know, by hand.

7 ARBITRATOR COOLEY: Okay. One more time.

8 MR. LUTZKER: Sure.

9 ARBITRATOR COOLEY: I just want to make
10 sure that I understand, and maybe the Panel. What
11 format are you asking for this material to be produced
12 in? All of it electronic? If there is -- if there
13 are any hard copies available, that they should be
14 produced? Or do you want them to actually take the
15 electronic and make the hard copy?

16 MR. LUTZKER: I'd say if we have a useable
17 electronic form, that's fine. A useable electronic
18 form should be fine for our purposes.

19 ARBITRATOR DAVIS: I have one question.

20 MR. LUTZKER: Sure.

21 ARBITRATOR DAVIS: In what format was the
22 information before it was translated to Microsoft

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1 Access?

2 MR. LUTZKER: DB. Mr. Galaz can --

3 ARBITRATOR DAVIS: Before you translated
4 it to Microsoft --

5 MR. GALAZ: DBASE-3.

6 ARBITRATOR DAVIS: What's that?

7 MR. GALAZ: DBASE-3.

8 ARBITRATOR DAVIS: DBASE-3. Okay.

9 MR. GALAZ: DBASE-3.0, which I -- should
10 I -- you mentioned that.

11 ARBITRATOR DAVIS: That's okay. Thank
12 you.

13 CHAIRPERSON CAMPBELL: Mr. Olaniran, do
14 you want a short break?

15 MR. OLANIRAN: If we could.

16 CHAIRPERSON CAMPBELL: About 10 minutes?
17 Five after 11:00?

18 ARBITRATOR DAVIS: Excuse me. Before we
19 take a break, perhaps during the break we'd like to
20 see a copy either on a computer screen or just a piece
21 of paper, of what the alpha list looks like, what the
22 EQ1997IN looks like, what the CDC interpolation looks

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1 like, the Nielsen data, and the TV Data data, if we
2 could do that, just so we know exactly what we're
3 talking about.

4 MR. OLANIRAN: We don't have electronic
5 copies, but we do have actually -- I think they have
6 a hard copy of what the database --

7 ARBITRATOR DAVIS: That would be
8 fantastic.

9 MR. OLANIRAN: And the alpha list also.

10 CHAIRPERSON CAMPBELL: That would be good
11 also for the record.

12 All right. We will take a break. Thank
13 you.

14 (Whereupon, the proceedings in the
15 foregoing matter went off the record at
16 10:52 a.m. and went back on the record at
17 11:13 a.m.)

18 CHAIRPERSON CAMPBELL: All right. We will
19 resume the proceedings.

20 Mr. Lutzker?

21 MR. LUTZKER: In response to the request
22 to sort of physically see some of these things and try

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1 to -- I don't know how you want to do this together.
2 In IPG's motion to strike, which was filed
3 November 20th, Exhibits 12 and 14 contain reproduced
4 portions, just samples of the TV Data logs, the 82
5 station files, and the Nielsen data that was produced
6 for us. And these are the prior --

7 CHAIRPERSON CAMPBELL: And those were
8 produced prior for the CARP?

9 MR. LUTZKER: These are printouts from the
10 electronic files that were submitted during the
11 summer, before the CARP was empaneled. And when we
12 were able to access them, this is what was provided.
13 So the TV Data logs --

14 ARBITRATOR DAVIS: Does it go like this?

15 MR. LUTZKER: Yes. Yes. I mean, we're
16 subject to sort of the limitations of the printer,
17 but --

18 MS. KESSLER: These are TV Data log data?

19 MR. LUTZKER: Yes. Yes. And so just
20 reading across, it provides the call sign, the date of
21 telecast of '97, January 1, the time, the length of
22 the program. This may be a code category for TV Data.

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1 Program's origination, presumably it could be network,
2 local, syndicated. Title of the show, performers,
3 directors, some reference to syndication program, and
4 a synopsis. So that's what TV Data provides.

5 The Nielsen data has a program title, a
6 program code, program source, presumably local,
7 network, or whatever, cycle --

8 MS. KESSLER: That's a sweep period.

9 MR. LUTZKER: -- sweep period, year,
10 weighted household, hours.

11 MS. KESSLER: That's the number of distant
12 cable households that viewed during that time slot.

13 MR. LUTZKER: Okay.

14 ARBITRATOR DAVIS: This is distant cable
15 households for weighted house projection?

16 MS. KESSLER: Yes, that viewed this
17 program during this particular time slot.

18 ARBITRATOR DAVIS: Okay. Program source.
19 L is -- stands for what?

20 MS. KESSLER: I don't know, but my guess
21 is that that stands for local.

22 ARBITRATOR DAVIS: F?

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1 MS. KESSLER: I would guess Fox.

2 ARBITRATOR DAVIS: S is?

3 MS. KESSLER: Probably syndicated. Is
4 that America's Funniest Home Video?

5 ARBITRATOR DAVIS: Yes.

6 MS. KESSLER: Yes.

7 ARBITRATOR DAVIS: LN? Live news?

8 MS. KESSLER: What is it?

9 ARBITRATOR DAVIS: Fox 5 Live.

10 MS. KESSLER: I'm not going to speculate,
11 because I don't know what that would stand for.

12 ARBITRATOR DAVIS: Okay.

13 MR. LUTZKER: All right. And then this is
14 the continuation of that. There is some ID number, a
15 market code, day of the week, week, quarter -- number
16 of quarter hours, a station code, and call letters.
17 And this last one -- SAT indicator -- I don't know
18 what that is.

19 MS. KESSLER: I don't know what that is
20 either.

21 CHAIRPERSON CAMPBELL: I have a question
22 on day of the week. So you begin your week on Sunday

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1 or Monday when you do this kind of --

2 MS. KESSLER: Neither one. We begin the
3 week on Thursday.

4 MR. LUTZKER: That's Nielsen's practice.
5 It's --

6 MS. KESSLER: That's a Nielsen thing. The
7 sweep period begins on a Thursday, goes for four
8 consecutive weeks, and ends on Wednesday.

9 MR. LUTZKER: Okay. So that -- so the TV
10 Data information is what you see there. The Nielsen
11 data is what you see there. And what we were
12 suggesting is the diary -- the weighted household
13 derives from diary information that's not provided.

14 Now, let me show you the -- this was
15 received last week, and it was submitted, as we
16 understood, to be interpolation weightings. That's --
17 that would be my understanding of this document. And
18 it will -- I won't try to interpret the interpolations
19 weighting. We'll save that.

20 ARBITRATOR DAVIS: Excuse me. Who
21 generated this document? Who printed it out? It says
22 "Nielsen Meter Ratings."

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1 MR. LUTZKER: This is what we were
2 provided by --

3 MR. OLANIRAN: I'll address that when I
4 address everything. But I think that printout itself
5 came from CDC.

6 ARBITRATOR DAVIS: Thank you.

7 MR. LUTZKER: Okay. So those are the
8 three documents here. We have this in electronic
9 format, but it's also -- this is what they started to
10 produce, as I understand it. And this was sent --
11 presumably, produced at Larson's offices and delivered
12 to us via MPAA. Okay? And it contained that
13 information, this cover information.

14 And then, the columns of information, as
15 I am interpreting this, relate to a date of the year,
16 a time, length of the program, average household,
17 which would be average households.

18 Okay. Then, there's a listing of TV -- I
19 would hesitate to say -- there is then an origination
20 code, and there's also -- the data on the top is
21 summarized here, so the TV is program, type code, by
22 TV Data. The origination code is from TV Data, in

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1 terms of network syndication. And sweep information
2 presumably relates to Nielsen data.

3 Movie or syndicated series, year, a
4 synopsis which presumably also comes from TV Data I
5 guess, has actor/director. That was the TV Data
6 information.

7 Then, here -- you see here this is the
8 call sign for KABC. And then there are columns here,
9 claimant with a question mark, and MPAA with a
10 question mark. And the columns appear to say yes, no,
11 or blank.

12 So this is in hard copy form what we're
13 interpreting to be this document, the EQ1997IN.

14 ARBITRATOR DAVIS: And this document goes
15 from station KABC through station KGO?

16 MR. LUTZKER: Correct.

17 ARBITRATOR DAVIS: And I assume there's
18 another one, station KGP?

19 MR. LUTZKER: Well, there is where I
20 stopped the process after a point. I said, you know,
21 because we were able to access the electronic format,
22 we determined having a couple of samples would be more

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1 than sufficient for our immediate purposes, and it is
2 helpful. Okay?

3 CHAIRPERSON CAMPBELL: What, please, for
4 the record does EQ1997IN stand for?

5 MR. OLANIRAN: That was just the name of
6 the file that was -- we gave to them electronically.
7 But that file essentially contains the information
8 that's in the printout.

9 CHAIRPERSON CAMPBELL: So it's an
10 electronic file identifier.

11 MR. OLANIRAN: It's an electronic file of
12 the CDC database of all information, including
13 interpolations. And Mr. Lutzker is actually incorrect
14 that the printout -- that he considers the
15 interpolations. That's just one of the factors that's
16 used for the interpolations. I don't think it's
17 correct that it's not interpolations. Interpolated
18 data is all incorporated in the entire CDC database.

19 CHAIRPERSON CAMPBELL: Okay.

20 MR. LUTZKER: I'm just saying what we got.

21 Then, in terms of the alpha list, we have
22 two alpha lists -- the alpha list which was provided

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1 and which we have in certain exhibits which was dated
2 March 17, 2000, and then we received a -- I'll call it
3 an amended alpha list with this recent package.

4 It's similar in format and information.
5 There are obviously data that's different between one
6 and the other. And this is, again, where having asked
7 for it in electronic version would enable us to
8 compare, you know, if there would be -- I mean, this
9 document is 85 pages, appears to be a complete
10 document. And this other one I remember was 116 or so
11 -- is 113 pages -- no, 114 pages. So originally 114
12 pages; now it's 85 pages.

13 And this -- these files, I'll call them
14 files, are derived from this data, and that's -- in
15 other words, we have this. We have this. We don't
16 have how this is derived. That's what I was trying
17 to --

18 CHAIRPERSON CAMPBELL: I have one
19 question, Mr. Lutzker, and Mr. Davis may have a
20 question, too. When you say what you don't have is
21 how it is derived --

22 MR. LUTZKER: And in electronic format.

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1 CHAIRPERSON CAMPBELL: -- and in the
2 electronic format, it comes from the EQ. This is the
3 alpha list. You want to know how it's derived. Is
4 your question, what questions did they ask to create
5 this? Is that what you're saying by -- is that what
6 you mean by "how it is derived"?

7 MR. LUTZKER: Yes.

8 CHAIRPERSON CAMPBELL: Okay.

9 Mr. Davis, do you have a question?

10 ARBITRATOR DAVIS: I just have one more
11 question. You mentioned before, Mr. Lutzker, about
12 the five-digit and six-digit BIB code number.

13 MR. LUTZKER: Yes.

14 ARBITRATOR DAVIS: I see that appearing on
15 the left of the alpha list, and I don't particularly
16 see it in the TV Data logs --

17 MR. LUTZKER: Right.

18 ARBITRATOR DAVIS: -- the Nielsen data, or
19 the EQ1997IN. Is that what leads you to write that
20 question mark?

21 MR. LUTZKER: Right.

22 ARBITRATOR DAVIS: Thank you.

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1 MR. LUTZKER: And you'll notice also --
2 and I -- my recollection is it doesn't appear there.
3 There's an owner code in this alpha list, which I
4 don't recall.

5 CHAIRPERSON CAMPBELL: You don't recall
6 that information was there?

7 MR. LUTZKER: No.

8 CHAIRPERSON CAMPBELL: One last question
9 before I let Mr. Olaniran get to his responses. The
10 diaries on the Nielsen data -- what is it that you
11 want from those diaries? Do you want to see all of
12 the diaries?

13 MR. LUTZKER: No.

14 CHAIRPERSON CAMPBELL: You did see --

15 MR. LUTZKER: We need to know -- Nielsen
16 -- as I have explained, Nielsen has two methods of
17 measuring television household viewing. One method is
18 meters, which are essentially hard-wired into several
19 thousand homes, and they are automatically -- the
20 information is automatically communicated. There are,
21 my understanding, somewhere between 3- and 4,000
22 households in the United States that are wired for

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1 that purpose.

2 As a station sample -- I mean, if any of
3 that data is used -- and it's not clear to us at this
4 point if any of that is used or how it would be used.
5 But if any of that data is used, it becomes highly
6 relevant based upon the statistical sampling that's
7 being done and the narrow number of households
8 involved.

9 But the number of diaries that are
10 involved, where they're located, how they're
11 distributed throughout the United States, with respect
12 to picking up the particular signals that are being
13 picked up, in relation to the signals that carry
14 distant programming on particular cable systems spread
15 around the country.

16 With respect to the diaries, the Nielsen
17 -- the NSI, which are done four times a year, there
18 are -- as I indicated, there are approximately 25,000
19 diaries sent out each week, of which a certain number
20 are returned. We don't know how many have been
21 returned. Of which -- and let's use, for purposes of
22 discussion, half of them are returned. Okay? So

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1 there are 12,500 diaries that Nielsen gets every week
2 back from people. That's in the Nielsen database.

3 How many of those diaries are then used in
4 connection with the 82 stations that MPAA has
5 identified? Where are they located? How are the
6 diaries then extrapolated by Nielsen to derive ratings
7 or viewing information, however you characterize it?

8 What qualifications would Nielsen, as the
9 expert in data research, put on the data? Do they
10 feel it is reliable data or not? They typically
11 provide qualifications and report information to their
12 clients.

13 And we feel that was clearly -- all that
14 information, whether it's in hard copy or electronic
15 format, as long as it's legible that information is
16 essential. We don't need to go back -- I know in past
17 proceedings there was desire and effort to sort of
18 look at particular diaries. We're not concerned about
19 that for this proceeding.

20 At a minimum, we want to know -- and we
21 believe we are entitled to know, and it hasn't been
22 provided -- how many diaries, where they were located,

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1 what the Nielsen -- how Nielsen evaluates that
2 information, how they make projections.

3 And, again, it's unclear to me at this
4 point -- as we get to the CDC data, and maybe Mr.
5 Olaniran can sort of further clarify this, there is
6 reference in the top of the CDC document to metered --
7 to meters. And I don't quite know, but if any metered
8 information is used in the interpolation, then that
9 raises a whole additional host of Nielsen ratings
10 information which should be provided, because that's
11 the underlying data which is part of the essential
12 interpolation performed by CDC.

13 CHAIRPERSON CAMPBELL: Thank you very
14 much.

15 Mr. Olaniran?

16 MR. OLANIRAN: I think I should start by
17 saying that a lot of the questions that are raised by
18 CDC really have to do with explanations they have not
19 been provided for the documents that are in front of
20 them. And as we've said all along, there are free to
21 cross examine Ms. Kessler as to how those documents
22 all come together, and whether or not her explanations

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1 are satisfactory to the CARP or to IPG. That would
2 happen after that.

3 But I think you will notice that Mr.
4 Lutzker has identified the basic elements that we were
5 required to provide. He told you that we have the
6 individual elements of the database, the Nielsen
7 study, the TV Data data, the interpolations, and we
8 also have the CDC database.

9 Ms. Kessler provides in her testimony the
10 formula for computing the viewing hours, which is
11 really what the crux of the matter is.

12 So they have all of this information, and
13 the question is, well, how does it all come together?
14 Well, you can't conduct deposition -- you can't
15 conduct discovery by trying to do a deposition in this
16 process. That's one of the -- that's the way this
17 process works.

18 They have all of the individual elements
19 of the database. They have the CDC database. They
20 have the formula that's used to come up with the
21 database. But they have questions. Well, that's
22 fine. Again, if you have questions, Ms. Kessler would

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1 answer those questions. And then they disagree on
2 whether or not the questions are satisfactory.

3 As to the -- Mr. Lutzker talked earlier
4 about the format that the database was provided to
5 them in. Mr. Larson of CDC called Mr. Lutzker and Mr.
6 Galaz about a week before he had to produce them. He
7 did not get any calls back from them. He talked to
8 me, and I said, "Well, do it in the most reasonable
9 format that you think it's possible." He did it in
10 DBASE-3, which is about 20 years old in terms of how
11 long it's been on the market. It's an over-the-
12 counter software, just like Microsoft Access.

13 And they had produced a DBASE-3 file to
14 IPG before. So -- and they tested the disk before
15 they sent it out. So Mr. Larson honestly did not
16 appear to anticipate that there would be any problems
17 with accessing the data.

18 As to the Nielsen data itself, the issue,
19 as I understand it now, is not that we haven't
20 produced the Nielsen study because we have. And I
21 think Mr. Lutzker acknowledges that they have received
22 the Nielsen study.

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1 The issue now is, well were we required to
2 produce the underlying documents that Nielsen used for
3 the study? And our view has always been that we did
4 not use those underlying documents; Nielsen did. This
5 is what Nielsen does for a living, and they do a
6 national study. And when we -- we give them
7 parameters as to what we want from what they already
8 have, and they give it to us. The letter that we sent
9 to Nielsen we provided to them.

10 So we never viewed -- again, I explained
11 earlier that in those proceedings that they have asked
12 for documents underlying the Nielsen study are those
13 proceedings where the Nielsen study itself was put
14 into evidence. There was usually a Nielsen witness
15 sponsoring the evidence, and there was a lot more
16 information that was required to be produced, because
17 the study itself was put into evidence.

18 We have not put the Nielsen study into
19 evidence. We use a fraction of the Nielsen study,
20 incorporated that fraction into the CDC database, to
21 produce the viewing hours. That's how -- so we're
22 really talking about information that's three times,

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1 possibly more, removed from what Ms. Kessler actually
2 used.

3 And Mr. Lutzker has been around this
4 proceeding long enough to know that those are the only
5 times that the Nielsen underlying data becomes an
6 issue, is when the study is put into evidence. The
7 study has not been put into evidence.

8 In terms of the number of households in
9 the instance surveyed and so on and so forth -- and,
10 again, that's all part of Nielsen's underlying study.

11 We referred to -- we designated testimony
12 from prior proceedings that discusses in detail how
13 Nielsen goes about doing its study. And I think in
14 one of those proceedings, there was cross-examination
15 and the other proceeding did not go through with a
16 hearing.

17 So, again, we have all of the information
18 that Ms. Kessler relied on in putting her testimony
19 together. We have provided that. Again, if they want
20 something, what Nielsen used, we think that's beyond
21 the scope of Ms. Kessler's testimony. And we did not
22 interpret the order as requiring us to produce those

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1 kinds of data.

2 Mr. Lutzker referred earlier to a document
3 as interpolations. And, again, this is one of the
4 things that we have attempted to clarify. The
5 document that he referred to as interpolation that is
6 actually not interpolation, is one of the factors, I
7 believe, that's used as part of the interpolations.

8 The Nielsen data and the interpolated
9 data, all of those that are incorporated in the CDC
10 database, which have been provided to them
11 electronically and some of those that have also been
12 provided, about 4,000 pages I think, in writing.

13 And, again, it just appears to me that
14 this is an attempt to conduct deposition. If we're
15 looking for explanations as to how the data come
16 together or if there's a disagreement as to how the
17 process should work, then that's fair game for
18 cross-examination.

19 Mr. Lutzker has described processes that
20 CDC undergoes for producing the data and also
21 processes that Nielsen undergoes. I don't know what
22 his basis for that is. There's certainly nothing in

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1 Ms. Kessler's testimony that describes the kind of
2 process that he's talking about.

3 And, again, he's free to ask her questions
4 about how these data come together. And I really
5 think once she gets on the stand, she can clarify for
6 the panel how program supplies about incorporating all
7 of the data, some of the processes that CDC undergoes,
8 and it will become clear at that point. But I really
9 think at this point they have all of the information
10 that they really need.

11 And, again, I need to stress that CDC has
12 the data at CDC. And they have always had the
13 opportunity to go to CDC and do whatever they wish to
14 do.

15 Well, they never did that. And we have
16 made that available. Again, this is the first time in
17 I don't know how many years that we have actually been
18 required to start printing copies of entire databases.
19 I don't think there really is a reason for it.

20 Previous orders that are significantly
21 larger amounts have been at issue. And they have
22 always had to go to CDC. So I think this is

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1 unprecedented as far as I know in the history of
2 discovery in these types of proceedings.

3 CHAIRPERSON CAMPBELL: Mr. Lutzker?

4 MR. LUTZKER: Thank you.

5 First I'd like to refer back to the
6 Copyright Office's order of June 28 in which the
7 Copyright Office ruled that the Program Suppliers'
8 viewer study sponsored by Ms. Kessler is their
9 principal piece of evidence supporting their
10 distribution claim.

11 The study combines information obtained
12 from Nielsen Media Research Group regarding nationwide
13 viewership in 1997 of syndicated programs represented
14 by Program Suppliers with information from CDC
15 regarding distant viewership of these programs on
16 cable systems. Apparently CDC has its data and
17 Nielsen has its data in its possession but only in
18 electronic form.

19 They then go on to indicate that the study
20 is essential to their claim and all supporting
21 documents must be produced. In your order of December
22 21st, again dealing with the viewer study and dealing

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1 with the Nielsen data, it was perfectly clear that, in
2 addition to the physical study that MPAA was obligated
3 to provide underlying data from Nielsen, as we have
4 identified here, that support the conclusions.

5 And these documents represent conclusions
6 drawn from data. As part of this process, we are
7 entitled to test those conclusions by review of the
8 data that is assembled to create those conclusions.

9 Despite Mr. Olaniran's suggestion, there
10 is absolutely nowhere in the massive material supplied
11 anything that tells this panel or IPG how many Nielsen
12 diaries were used in assessing this information.

13 There's nothing that tells where those
14 diaries were physically located in relation to the
15 stations that are being assessed. There is absolutely
16 nothing in the record that supports the interpolation
17 waiting conclusions drawn by CDC. We are entitled to
18 test those conclusions.

19 They present a conclusion. They say Ms.
20 Kessler will deal with the conclusions. What we are
21 entitled to, what your orders have said, is we are not
22 only entitled to test the conclusions.

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1 To do that by cross-examination, we must
2 have the underlying data so that we can compare and
3 contrast and make our own assessment to help you make
4 your assessment because that's the fundamental issue
5 here. Does the panel have enough information before
6 it to reach the conclusions that the results that MPAA
7 has proffered are correct or are the results of IPG
8 correct or something else, something in between?

9 The suggestion that this is a novel event,
10 well, in fact, we are at a novel point in time. Not
11 since the 1986 proceeding -- so that's an 11-year gap
12 -- has there been a Phase II in the Program Supplier
13 category.

14 We cannot point to anything during that
15 time period, and the industry has changed dramatically
16 during that period. So there is no Phase II record to
17 rely upon.

18 There is not even a Phase I record in the
19 1997 case nor 1996, '5, '4, or '3. There has been no
20 record for the better part of half a decade with
21 respect to the information proffered here.

22 Mr. Olaniran says: Well, you can look at

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1 prior studies. Well, in prior years MPAA has assessed
2 60 stations, then 140 stations and 170 stations. Now
3 they've got 82 stations. There are different
4 stations. There are different programs. These things
5 change from year to year. And we're dealing now with
6 1997.

7 They haven't said the data doesn't exist.
8 They have suggested the data can be discerned from the
9 books, but I defy anyone or I'll beseech your help.
10 Help me. Find it. I don't see it. We have looked
11 for it. It's not there.

12 We feel the order was very clear. We feel
13 that there was no question. They should have gone to
14 CDC and gotten underlying information for the MPAA
15 viewer study. They should have gone to Nielsen and
16 got underlying data for their Nielsen study. The fact
17 that they have not done that is telling in our view.

18 We're also dealing here with a situation
19 where tens of millions of dollars are being claimed.
20 As I sort of reflected before, I mean, we are trying
21 to present for the first time a case in a Phase II
22 proceeding.

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1 MPAA has a long history with respect to
2 other panels, including CARPs and CRTs, addressing the
3 issues of disclosures with respect to Nielsen data,
4 primarily in Phase I proceedings. It hasn't happened
5 in a Phase II proceeding, but here we are.

6 The rulings of the Copyright Office have
7 been clear. The rulings of the panel have been clear.
8 And if they are to use this material in their case,
9 they should have provided it.

10 We are now at the start of the proceeding.
11 They haven't provided it. And, again, following your
12 recommendation in your order of December 21st, it was
13 indicated that "In the event IPG determines that the
14 Program Suppliers are not in compliance in any respect
15 with this order to provide underlying data from
16 Nielsen, underlying data from CDC, IPG may move before
17 this CARP panel for an immediate ruling on a motion to
18 strike and/or request other relief as appropriate."
19 At this point we move to strike.

20 CHAIRPERSON CAMPBELL: Mr. Olaniran?

21 MR. OLANIRAN: Just briefly. Again, we
22 have produced the underlying data. The question is:

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1 Did we produce the data that Ms. Kessler relied on for
2 her testimony? We have.

3 She relied on the Nielsen data to the
4 extent that the Nielsen study was relevant to her
5 testimony, to the extent that the Nielsen study was
6 utilized by CDC in coming up with what they consider
7 to describe as the viewer study but what really is the
8 CDC database from which the alpha list is extracted.

9 The genesis of this inquiry is what Ms.
10 Kessler relied on for I think Exhibits 1 and 3 in her
11 testimony. Exhibit 1, I believe, is a listing of the
12 claimants. And Exhibit 3, I think, is a listing of
13 the titles.

14 For some reason, this has somewhat -- we
15 are now getting into layers and layers of documents
16 that are far removed from anything that Ms. Kessler
17 relied on in her testimony.

18 Ms. Kessler has a bottom line number in
19 her testimony with regard to viewing hours. They
20 wanted to know: Well, how did you get the viewing
21 hours? Well, we produced the database and the alpha
22 list.

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1 They said: Well, how did you get the
2 database? We gave them the TV data, the Nielsen data,
3 the interpolations, and we gave them the formula for
4 deriving the viewing hours. Now they're asking more
5 and more questions.

6 I don't think there's any way in my
7 opinion -- having gone through this for about six
8 months not, I don't think that there is in my opinion
9 any way to satisfy IPG and still be within the
10 confines of the law.

11 What the regulations require is that we
12 provide what Ms. Kessler relied on for her testimony.
13 We have provided that.

14 CHAIRPERSON CAMPBELL: Mr. Olaniran?

15 MR. OLANIRAN: Yes?

16 CHAIRPERSON CAMPBELL: Let me ask a
17 question. And correct me if I'm wrong.

18 MR. OLANIRAN: Sure.

19 CHAIRPERSON CAMPBELL: You are saying, I
20 think, that yes, Nielsen has a lot of additional
21 information.

22 MR. OLANIRAN: Yes.

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1 CHAIRPERSON CAMPBELL: But that additional
2 information is not information that Ms. Kessler used
3 for this particular case. You're not denying that
4 there is additional raw data available at Nielsen, but
5 it's not data that was used by MPAA. Is that a
6 correct analysis?

7 MR. OLANIRAN: That is correct. We used
8 the Nielsen report. That's it. The disk that we
9 provided to them is what we used. Now, they will tell
10 you there are two versions of the disk. I think I
11 attempted to explain that at oral argument.

12 There are two versions. The original disk
13 that came from Nielsen we forwarded to them directly.
14 Now, what happens is that CDC also got a copy of the
15 original disk. And what CDC did is extract the
16 information that was only relevant for the purposes of
17 this proceeding and produced it to them.

18 So they do have two different disks.
19 Well, both disks are complete with regard to
20 information that was relied on for producing the
21 database which we have now produced to them. So they
22 have that information.

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1 CHAIRPERSON CAMPBELL: And is what you're
2 saying the second disk, which was the CDC
3 extrapolation, was really the focused information that
4 was used? You asked to have them flip that out of the
5 additional data?

6 MR. OLANIRAN: That's correct. And I
7 believe the original study may have even also included
8 information about the Joint Sports Claimants and the
9 Devotionals and so on and so forth. I mean, it was a
10 lot of information. And CDC just extracted those
11 stations that were relevant for the purposes of this
12 --

13 CHAIRPERSON CAMPBELL: For the Phase II
14 proceeding?

15 MR. OLANIRAN: For this Phase II
16 proceeding.

17 CHAIRPERSON CAMPBELL: Right.

18 MR. OLANIRAN: And that's what was
19 provided to them.

20 CHAIRPERSON CAMPBELL: Thank you. Is
21 there anything else that you needed to add?

22 MR. OLANIRAN: Well, Mr. Lutzker spent a

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1 great deal of time talking about the diaries. I'm not
2 sure if the diaries even exist. I mean, I don't know.
3 And I think Ms. Kessler is probably more knowledgeable
4 about that particular subject than I am.

5 But the point that I'm making is that they
6 have questions about the information that we produced.
7 Because of the nature of the discovery process, they
8 don't have explanations for some things. And they are
9 free to cross-examine Ms. Kessler on those questions
10 that they may have.

11 I think it's incorrect to say that we have
12 not produced the documents that she relied on for her
13 testimony because we have.

14 CHAIRPERSON CAMPBELL: Mr. Lutzker, did
15 you have a quick response?

16 MR. LUTZKER: Yes, a quick response. The
17 issue as the Copyright Office has said and as this
18 panel has said is not solely what Ms. Kessler
19 personally relied on.

20 They commissioned a study from Nielsen we
21 are entitled under the Copyright Office's ruling to
22 look at. The party that they commissioned the

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1 information from they are entitled to turn over.

2 If Ms. Kessler simply was handed a piece
3 of paper, said, "Here. Read this," that is not their
4 case. Their case is based upon the preparation of the
5 information underlying that final document. They have
6 tried throughout this entire proceeding. They have
7 resisted.

8 And we don't come to this point not having
9 asked, asked, asked, having rulings in support by the
10 Copyright Office in June to say the study is the pivot
11 point of their case. And that is historic in terms of
12 prior CARP rulings and CRT rulings.

13 The MPAA viewer study going back to the
14 early '80 proceedings has been the foundation on their
15 case. There's no surprise with respect to this, none
16 whatsoever.

17 They rely upon Nielsen information. They
18 rely upon it. That they don't have a physical
19 document that they have reviewed is not the point.
20 The point is Nielsen has those documents and we are
21 entitled to them to test Nielsen's conclusions.

22 ARBITRATOR COOLEY: Question: What is the

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1 date of the Copyright Office's order?

2 MR. LUTZKER: The 28th of June.

3 ARBITRATOR COOLEY: What is the date on
4 that order that MPAA produced the underlying Nielsen
5 information?

6 MR. LUTZKER: June 28th.

7 CHAIRPERSON CAMPBELL: Page 8 perhaps?

8 MR. LUTZKER: Page 8, "Program Suppliers'
9 viewer study is essential to its claim. And all
10 supporting documents must be produced."

11 Later, in September, "IPG is entitled to
12 the viewership data provided by Nielsen and CDC's data
13 on distant viewing." And later, in September, the
14 Copyright Office ruled if I can -- I mean, this was
15 this very issue of: Well, it's not in my physical
16 possession. It's in somebody else's physical
17 possession.

18 CHAIRPERSON CAMPBELL: What is the date of
19 that order?

20 MR. LUTZKER: I just want to confirm the
21 language on that.

22 CHAIRPERSON CAMPBELL: Are you talking the

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1 September 13 perhaps?

2 MR. LUTZKER: Yes.

3 CHAIRPERSON CAMPBELL: Pages 2 through 4?

4 MR. LUTZKER: I mean, Pages 2 through 4
5 does deal with the ruling on providing information,
6 but there was another ruling, which I will find, that
7 specifically addresses the question of whether the
8 fact that Ms. Kessler did not see it, but a third
9 party, who has produced the material for them, has it.
10 And the ruling was that that had to be provided. And
11 that I will find for you. It might have been --

12 CHAIRPERSON CAMPBELL: That was the --

13 MR. LUTZKER: That might have been
14 October.

15 CHAIRPERSON CAMPBELL: -- October the
16 10th.

17 MR. LUTZKER: Right. That's right.
18 Right. That's on Page 4. It's not a defense to a
19 discovery request to assert that the witness did not
20 rely upon or see the document requested. It's not a
21 defense.

22 The Copyright Office was crystal clear

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1 that this information, even though it was not
2 physically seen by Ms. Kessler, can still be produced,
3 required to be produced, was required to be produced,
4 and has not been produced.

5 ARBITRATOR COOLEY: And I think on Page 4,
6 "If the documents are in possession of a third party,
7 then the party to the proceeding must make
8 arrangements with the third party at its own expense
9 to assure that the documents are produced in a timely
10 fashion." Is that --

11 MR. LUTZKER: Yes.

12 CHAIRPERSON CAMPBELL: We need to take a
13 CARP break to review this issue. This is a critical
14 issue.

15 MR. OLANIRAN: May I just address --

16 CHAIRPERSON CAMPBELL: I'll let you do
17 that. I just want to tell you what we are going to do
18 after we have a chance to hear from you.

19 We'll do that. And then our lunch break
20 we'll attach to the tail end of that. That way you
21 don't have to sit here for 10 to 20 minutes twiddling
22 your thumbs while we're analyzing the situation. It

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1 will give you more opportunity to make a wiser use of
2 your time.

3 But first Mr. Olaniran has something to
4 say.

5 MR. OLANIRAN: Thank you.

6 I just wanted to say once you get a chance
7 to look at the June 28th order and the October 10
8 order, it will become clear that the Copyright Office
9 never intended to address underlying data that Nielsen
10 itself used. The Copyright Office was referring to
11 the underlying data that Ms. Kessler used in producing
12 the testimony.

13 You will also notice in the September 13
14 order, the Copyright Office cites another discovery
15 order. In that order, let me read for you the
16 Copyright Office's language. And I apologize I don't
17 have this many copies, but I will be more than happy
18 to make copies for you. Here's what --

19 CHAIRPERSON CAMPBELL: Is that the
20 September 13th order?

21 MR. OLANIRAN: I believe that's the
22 September 13th order on Page --

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1 CHAIRPERSON CAMPBELL: That's the page
2 number. That's what I was going to ask for the
3 record.

4 MR. OLANIRAN: Okay. I'm sorry. That is
5 the October 10th order on Page 4, the cited discovery
6 order in the ruling paragraph, in the first paragraph
7 of the ruling, towards the end of that paragraph.

8 In that order that they are citing, here
9 is what the Copyright Office said, "It is not the
10 intention of the library to require a party whose
11 witness states a number in his testimony to produce
12 all documents which track the history of that number
13 back to its initial source. Such a practice under the
14 rubric that these are underlying documents that verify
15 the accuracy of the number would drive up the cost of
16 the discovery process considerably in the CARP
17 proceeding without necessarily attendant increase in
18 the quality of the party's presentations before the
19 CARP."

20 It could not have intended that we go all
21 the way back to Nielsen to produce documents that Ms.
22 Kessler never even saw when she did her testimony.

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1 And that is essentially the point.

2 I don't think you can take from the June
3 28th and the October 10th or any of the Copyright
4 Office orders as requiring us to go back to Nielsen
5 and find out what Nielsen used for what could easily
6 be described as what is used as day-to-day operations.

7 We asked Nielsen for a copy of a study for
8 a certain number of stations. We provided the letter
9 that we sent to Nielsen to IPG. We provided the
10 letter that we sent to CDC to IPG. We provided them
11 a copy of the Nielsen study itself. We provided them
12 a copy of the interpolations based on that study. And
13 we have given all of this information to them.

14 What they are asking us is way beyond the
15 testimony of Ms. Kessler.

16 ARBITRATOR COOLEY: I just have a quick
17 question. May I?

18 CHAIRPERSON CAMPBELL: Please.

19 ARBITRATOR COOLEY: After our December 21
20 order, did MPAA make any requests of Nielsen for
21 underlying data?

22 MR. OLANIRAN: No, we did not.

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1 ARBITRATOR COOLEY: Has Nielsen seen a
2 copy of our December 21st order?

3 MR. OLANIRAN: I don't believe that they
4 have. And, again, the reason we did not make any
5 requests of Nielsen was because our interpretation of
6 the order was that we produce whatever we used for
7 Nielsen.

8 Again, Ms. Kessler's testimony does not
9 directly employ Nielsen data. It uses numbers that
10 have been put together by CDC. All of the elements of
11 the CDC database have been provided to them.

12 So we have never viewed either the
13 Copyright Office or this December 21st order as
14 requiring us to go to Nielsen to extract documents
15 from them that they used for their study.

16 ARBITRATOR COOLEY: Another question: Do
17 the procedures here in your perception allow at this
18 point either yourself, MPAA, or IPG to call a Nielsen
19 representative to testify here?

20 MR. OLANIRAN: Because I don't believe the
21 body has subpoena authority, I don't think the CARP
22 could require Nielsen to testify. And, again, Nielsen

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1 personnel have testified in the past when the Nielsen
2 study itself has been put into evidence.

3 That was one of the reasons we thought
4 that there would be questions about the process,
5 certain of the processes that Nielsen does. And we
6 designated prior testimony for that. And that's
7 allowed under the rules.

8 Now, if IPG finds the testimony
9 insufficient as to the questions they have, again,
10 they can ask Ms. Kessler on the stand as to: Well,
11 how does this testimony relate to what you're saying
12 today? It's also the past testimony.

13 There have been cross-examinations on the
14 testimony. There have been exhibits that were put in
15 to support the testimony. So they have a wealth of
16 information. And if they have questions, again, they
17 can ask Ms. Kessler.

18 ARBITRATOR COOLEY: One more question,
19 please: If you were in Mr. Lutzker's shoes wanting
20 this underlying information in this proceeding and if
21 you were in Mr. Lutzker's mindset that he has asked
22 for this material several times from MPAA and not

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1 received it, what would you do at this time? What do
2 these procedures allow Mr. Lutzker to do to obtain
3 that underlying Nielsen information?

4 MR. OLANIRAN: If I were in Mr. Lutzker's
5 shoes, I honestly would concentrate on the documents
6 that I have and fashion my cross-examination questions
7 based on those documents.

8 Again, Mr. Lutzker knows the critical
9 inquiry is: What documents did Ms. Kessler rely on
10 for her testimony? And the next step is: Have
11 Program Suppliers produced those documents? They
12 have.

13 He also knows -- and he has not addressed
14 this once today -- that in those proceedings -- and if
15 you look at the copy of the transcript that they
16 attach to their motion to strike, that very
17 proceeding, the Nielsen study was in evidence. And
18 different rules apply when you put the Nielsen study
19 in evidence. And that's precisely the point. If I
20 were in his shoes, I would accept the fact that the
21 documents are what they are.

22 Now, he may fashion whatever

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1 cross-examination questions he thinks are appropriate
2 to answer some of the questions that he has, but I
3 think it's entirely inappropriate to require Program
4 Suppliers to go back to Nielsen to ask for documents
5 that may not even exist.

6 ARBITRATOR COOLEY: How old is the Nielsen
7 testimony that has been submitted I think at the
8 transfer point?

9 MR. OLANIRAN: There were two testimonies
10 that were designated for the record. We designated
11 both the testimony, the hearing exhibits, and also the
12 exhibits that were submitted with the testimony and
13 the transcripts.

14 The one proceeding was the '92-'95
15 satellite distribution proceeding that's been
16 designated for the record. We designated the
17 testimony of Paul Lindstrom, who is an incident
18 employee, who has testified numerous times in Phase I
19 proceedings and probably Phase II also.

20 We also designated certain testimonies
21 from the '89 cable distribution proceeding. Also Mr.
22 Lindstrom's testimony is in there also.

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1 CHAIRPERSON CAMPBELL: Mr. Lutzker?

2 MR. LUTZKER: A couple of quick things for
3 clarification. First, with respect to the Copyright
4 Office's order, if the data in question were an AFI
5 listing of the top 100 movies of all time and Ms.
6 Kessler wanted to introduce that document into the
7 record, I agree with Mr. Olaniran that by virtue of
8 the Copyright Office's interpretation, that type of
9 data would be taken at its value and MPAA would not be
10 under an obligation to retrace the steps as to how AFI
11 produced and so forth that list of the top 100 movies.

12 We're not dealing with the top 100 movies
13 here. We're dealing with the essence of the MPAA
14 case. It has been stated so by CRT orders from the
15 1980s through the CARP orders in the 1990-'92 cable
16 proceeding.

17 The Copyright Office understands this.
18 MPAA understands this. They had spent the better part
19 of the six months that we have been in this proceeding
20 with respect to discovery to resist at every occasion
21 the release of this information.

22 We have been forced to go for motions to

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1 compel, to go to delivery of certain documents, which
2 then of necessity require review and under CARP
3 procedures allow follow-up inquiries.

4 We have now on the eve of the opening, on
5 the opening of the proceeding been faced with a stark
6 reality that the most important figure in this
7 proceeding, 3.4 billion viewing hours and change --
8 what is the heart of the MPAA case? That number is
9 the heart of the MPAA case.

10 And they're saying we don't have a right.
11 We don't have a right to analyze that number. They're
12 saying that the Nielsen data that is at the foundation
13 of that and the CDC data that is at the foundation of
14 that number, which is the single most important number
15 in this proceeding, we are prohibited because Ms.
16 Kessler didn't look at underlying documents, Ms.
17 Kessler didn't review that, and it's almost a
18 suggestion that it's not even important. Well, it is
19 important. You have said it's important, the
20 Copyright Office has said it's important.

21 You cannot read the Copyright Office's
22 orders in this proceeding and suggest that the

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1 underlying documentation with respect to the Nielsen
2 study and the MPAA viewer study is not at the heart of
3 this case.

4 And the availability of this material now
5 provides -- I mean, let me just address the two
6 points. Do we have a right to call Nielsen? This is
7 MPAA data.

8 MPAA had to send letters to CDC to
9 authorize release of information to IPG in the context
10 of this proceeding. We don't have any right with
11 respect to that data. That data is owned by MPAA.

12 Yes, it is chosen from a part of a large
13 database of Nielsen. We are not asking for the large
14 database of Nielsen. We're asking for the focused
15 database of Nielsen that is used in developing the
16 information for this proceeding. It's a very
17 different animal, a very different animal indeed.

18 And for MPAA to suggest that we are
19 overburdening them in this process is, frankly, unfair
20 in the context that they have resisted providing the
21 information throughout the months and months and
22 months of this proceeding.

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1 And just the very fact that they failed to
2 even inquire, inquire, of Nielsen subsequent to your
3 order suggests that they had an interpretation. They
4 have stuck to it. And, as I said, the order to me is
5 read very clearly.

6 What is my remedy? If I were in my shoes,
7 I would come back to you, as you suggested, and say,
8 "Move to strike." And that is what I have done.

9 CHAIRPERSON CAMPBELL: Mr. Olaniran, I
10 have a question. You were reading to us, I believe,
11 from the order of October 30, 1995. Is that correct?

12 MR. OLANIRAN: I was actually reading from
13 the order that was cited in the October 10th.

14 CHAIRPERSON CAMPBELL: Which is the
15 October 30, 1995 order?

16 MR. OLANIRAN: Which is actually the
17 February 7, 1997.

18 CHAIRPERSON CAMPBELL: Okay.

19 MR. OLANIRAN: I have a copy of the order
20 here. I have only one copy. I'd be more than happy
21 if you need to take that with you.

22 CHAIRPERSON CAMPBELL: That is what I was

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1 going to ask. I was looking at the -- were you citing
2 the February 7th, 1997?

3 MR. OLANIRAN: Right, correct.

4 CHAIRPERSON CAMPBELL: Okay. The October
5 30th one is previously mentioned in that paragraph,
6 and I didn't know --

7 MR. OLANIRAN: Right.

8 CHAIRPERSON CAMPBELL: -- which one you
9 were citing. Could we perhaps have the opportunity to
10 review that during the break --

11 MR. OLANIRAN: Oh, absolutely.

12 CHAIRPERSON CAMPBELL: -- so that we can
13 take the language in a better context?

14 I have one more question, Mr. Lutzker.
15 Both direct cases do refer to Nielsen from time to
16 time. Are you questioning the validity of Nielsen or
17 the use of Nielsen or just wanting to see background
18 documentation?

19 That has confused me throughout this as I
20 have taken an in-depth look at your direct cases
21 because both parties do refer to Nielsen's reporting
22 from time to time in their direct cases.

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1 MR. LUTZKER: MPAA has referenced Mr.
2 Lindstrom's testimony in the '92 to '95 satellite
3 proceeding, which was actually an aborted proceeding.
4 It was settled without any opportunity for
5 cross-examination.

6 But Mr. Lindstrom in his testimony offered
7 and referenced by the MPAA said basically two things.
8 Nielsen has data that it collects. And industries
9 rely upon that data.

10 Now, in that testimony, Mr. Lindstrom
11 provided a chart describing the relative error factor
12 that he attributed to diaries. Now, the diary and
13 viewing analysis -- and I can provide a copy of this
14 because I made copies available for the panel. That
15 testimony suggests that when less than 5,000
16 households are involved and a program has an incident
17 of one viewing, the error factor is 90 percent with
18 regard to the data of Nielsen. The more data they
19 have, the more reliable the information.

20 Now, since I don't have all the background
21 on this, my assumption is that that data comes from an
22 entire universe of Nielsen data, Nielsen measures.

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1 There were 225 broadcast markets. There
2 are 1,200 systems. They have hundreds of thousands of
3 diaries that are collected and sampled. And obviously
4 the more data they have, the more reliable and useful
5 the information is. The less data they have, the less
6 reliable that information is.

7 Our position is MPAA knows, should know,
8 ought to know, and certainly this panel ought to know
9 if you were going to place any reliance upon the MPAA
10 viewer analysis, you must know what Nielsen thinks of
11 its own data. It has been asked in this proceeding to
12 take not all of its data but just a small sample of
13 its data, put it into a bowl, and come up with some
14 answers.

15 Is it reliable to a certitude? Is it
16 reliable to a 50 percent degree, to a 10 percent
17 degree, to an 0.1 percent degree? What degree of
18 reliability is there for Nielsen data?

19 We, in turn, rely on Nielsen data because
20 Nielsen is the hallmark of the industry. We want to
21 know what Nielsen thinks of its own data in this
22 particular proceeding.

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1 In prior proceedings, this information has
2 been available in Phase I without question. In Phase
3 II, now we have no Phase I proceeding to reference.
4 We have no documents. And these have been resisted.
5 We can't even understand why they would resist doing
6 this. They have chosen to do so. It is to us part
7 and parcel of their case.

8 To the extent that we rely on Nielsen
9 data, we have made all the data that we have from
10 Nielsen available. It is published public information
11 that we have relied upon. And, on the other hand,
12 MPAA has commissioned a subset of data and
13 information.

14 And so yes, both parties rely on Nielsen.
15 Nielsen is credible. And we think that the Nielsen
16 credibility should be part of the record. If it's not
17 part of the record and we think it has been ordered as
18 part of the record, then as a practical matter, it
19 should be stricken.

20 CHAIRPERSON CAMPBELL: Thank you.

21 Mr. Olaniran?

22 MR. OLANIRAN: I just need to clarify one

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1 or two things. Mr. Lutzker mentioned the testimony
2 that we designated from previous proceedings. He
3 mentioned that one was aborted. And it seems to
4 suggest that that's insufficient.

5 The rules and certainly the Copyright
6 Office orders in the past have made it very clear that
7 parties can, in fact, designate records from previous
8 testimony. And it doesn't matter that it was an
9 aborted proceeding. What the CARP can do is give
10 whatever weight it deems important to that particular
11 testimony.

12 And, again, that ties into my second
13 point, which is the CARP at the end of the day has the
14 discretion to accord whatever weight to how we employ
15 the Nielsen as part of our entire testimony.

16 And I've also stressed numerous times that
17 our entire testimony, the cornerstone of our
18 testimony, is not just the Nielsen data. The Nielsen
19 data is a fraction of the information that was used
20 for the viewing hours.

21 The most critical information that I think
22 IPG seeks is: What are the viewing hours associated

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1 with individual titles? And they have that.

2 So this appears to be just a fishing
3 expedition. I don't think it is critical to their
4 case in the least. What I would also urge the panel
5 to consider is to wait for Ms. Kessler to testify as
6 to all of this information and then determine whether
7 or not the information is sufficient or whether or not
8 we have, in fact, produced documents that she relied
9 on for writing her testimony.

10 And, again, you will find at the end of
11 her testimony that we have clearly provided all the
12 documents and IPG has rightfully questions about what
13 we produced. And they're free again to ask her
14 questions about those data.

15 CHAIRPERSON CAMPBELL: Thank you.

16 It is 12:20. I suggest that we resume at
17 1:30. And you are going to let us borrow your copy of
18 that?

19 MR. OLANIRAN: Absolutely.

20 CHAIRPERSON CAMPBELL: Thank you. Thank
21 you very much.

22 (Whereupon, the foregoing matter went off

1 the record at 12:17 p.m. and went back on
2 the record at 12:18 p.m.)

3 CHAIRPERSON CAMPBELL: We will reconvene
4 at 1:45. We'll need some time. I think it would be
5 more favorable to both parties if we had that time to
6 examine some of this testimony.

7 MR. OLANIRAN: I think we should probably
8 go on the record as to what information we're
9 providing.

10 CHAIRPERSON CAMPBELL: Right. Right now
11 I have a copy of an order dated February 7, 1997 "In
12 the Matter of: Adjustment of Rates for the Satellite
13 Carrier Compulsory License," Docket Number 96-3
14 CARP-SRA.

15 In addition, I have a copy of testimony of
16 Paul Lindstrom, solely the testimony. And that --

17 MR. LUTZKER: That was from the 1992-5
18 satellite proceeding.

19 CHAIRPERSON CAMPBELL: -- was from the
20 1992-95 satellite proceeding. Do you have, Mr.
21 Popham, the full testimony with examination?

22 MR. POPHAM: This goes back to testimony

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1 on November 19 of '91, Mr. Lindstrom's direct case
2 testimony.

3 MR. LUTZKER: Is that what was cited in
4 the record? Is that the referenced testimony?

5 MR. POPHAM: Yes and also Pages 5550 to
6 5783 of Docket CRT 91-2, the '89 cable distribution
7 proceeding. That page is tabbed for Mr. Lindstrom's
8 direct examination, cross-examination.

9 CHAIRPERSON CAMPBELL: Great. Thank you
10 very much. We will see you at 1:45.

11 (Whereupon, a luncheon recess was taken
12 at 12:19 p.m.)
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(1:45 p.m.)

CHAIRPERSON CAMPBELL: Thank you very much. We'll continue the proceedings.

The initial order of business, the panel has decided to reserve ruling on the motion to strike. It will remain under advisement for the moment.

Meanwhile, unless there's anything someone wants to raise, we would like to begin the examination, direct examination of Marsha Kessler.

MR. POPHAM: Madam Chairman, we're happy to do that. I don't know if you wanted to entertain opening arguments from either of us before we did that.

CHAIRPERSON CAMPBELL: Yes. And have you coin tossed on what order?

MR. POPHAM: Well, I think we anticipated since Ms. Kessler would be going first that I would be happy to go first as well.

CHAIRPERSON CAMPBELL: Very well.

MR. POPHAM: Thank you. I guess my only question would be is it do you prefer that I sit or

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1 stand?

2 CHAIRPERSON CAMPBELL: Whatever makes you
3 most comfortable.

4 MR. POPHAM: Thank you.

5 CHAIRPERSON CAMPBELL: Excuse me, and if
6 gets warm in here, I urge you to take your coats off,
7 your jackets off if that would be better for you too.

8 MR. POPHAM: In as much as there's nothing
9 for me to hide behind and because I would not want to
10 be perceived as looking down on you, I'm going to sit.
11 It also works better with the glasses.

12 I would like to start possibly by
13 violating all the rules of wise and effective advocacy
14 and distract you. I did start this morning because I
15 felt it necessary to mention the transition of our
16 representation from outside counsel to in-house. Now,
17 seeing it's a little quieter, I would just like to ask
18 you to indulge me a small tribute to Mr. Olaniran and
19 his predecessors who represented us over the years:
20 Arthur Shiner, Dennis Lane, Greg Olaniran, Michael
21 Tucci. They've all enjoyed our confidence for some 20
22 years now in these royalty distribution and adjustment

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1 proceedings. They're our long-time, ever capable
2 counsel, and we deeply appreciate all their efforts.
3 And you will continue to see Mr. Olaniran at my side
4 as we proceed this week. So, I appreciate your
5 indulging us that moment. I felt it appropriate to
6 get that on the record in some proceeding somewhere
7 while the moment was right.

8 I also appreciate your being here.
9 Washington is not exactly a tropical paradise in
10 January, and your interest in our issues and they
11 don't seem to be easy at this stage of the game, and
12 your intent to resolve this controversy are also very
13 deeply appreciated.

14 Twenty-five years ago when I was a young
15 or at least younger lawyer, I witnessed an oral
16 argument in a case entitled, "Home Box Office v. FCC."
17 And the issues were not particularly important, but
18 the one thing that I recall very clearly is Simon
19 Rifkin argued for the opposing side in that case, Home
20 Box Office, and he spent the great bulk of his
21 argument not speaking about the law. He spoke very
22 eloquently and indeed very passionately making the

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1 point that those big broadcasters are simply trying to
2 crush the little entrepreneurial cable operators who
3 were just trying to get started in this communications
4 business. And if I were Mr. Lutzker, in a way I think
5 I would be tempted to do exactly the same thing.

6 But let me say I think that is -- it's an
7 invalid contrast for a number of reasons. First of
8 all, I think it's a very questionable contrast, and
9 you'll hear questionable when we talk about IPG's
10 claims in this proceeding. I think we will be able to
11 peel away some of the patina of the brave little up-
12 start daring to challenge the powerful entrenched
13 MPAA.

14 But there's some other contrasts that I
15 think are even more worthy of note. Ms. Kessler will
16 testify as to MPAA's long-standing, very established,
17 very respected role in the distribution of cable
18 royalties, particularly the part of the royalties
19 that's due to program suppliers. You will know what
20 we do; you will know who MPAA is; you will know how we
21 do it; you will know what we do.

22 In contrast, the IPG claim so far has

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1 provoked a lot of questions. Who is IPG? What is
2 IPG? How do all these related names and entities
3 we're confronted with fit together? Who's really
4 authorized one or more of these entities to speak for
5 them? When did they do it? Why is Mr. Galaz pursuing
6 these claims as IPG? We have a lot of questions, and
7 we'll be looking for answers.

8 Another contrast is all of MPAA's
9 claimants filed their own claims. None of the
10 claimants represented by IPG filed their own claims.
11 And yet another contrast: IPG's case hangs on the
12 slender thread of a single formula or methodology for
13 distribution, and we're going to test whether the
14 theoretical hook on which that thread hangs is strong
15 enough to hold it up. And we're going to test whether
16 the thread itself is strong enough not to snap under
17 the weight of its own infirmities.

18 We're also going to test whether the
19 formula you might rely on is an alternative to MPAA's
20 methodology. In other words, is that formula
21 essentially to fair to all or perhaps fairer to some
22 than others.

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1 And one analogy has come to mind in this
2 process. We learned through the difficulties in
3 December in this country that you can't count votes
4 different ways. You have to count votes the same
5 ways. And we think that all claimants should be
6 treated on the same basis and that you do have
7 competing formulas and you have to look very closely
8 at those formulas and determine which formula gives
9 you the best methodology, the fairest methodology to
10 all for distributing the royalties.

11 And I would point out in contrast to the
12 single formula that IPG uses, MPAA's case is multi-
13 faceted. Ms. Kessler's testimony includes five solid
14 bases for awarding virtually all of the royalties to
15 MPAA. They're all focused on providing evidence of
16 the value of the programs represented by MPAA
17 claimants in the marketplace. And as Ms. Kessler will
18 testify, the marketplace for retransmitted programming
19 is right here in this room. Her testimony will leave
20 no doubt that MPAA claimants are entitled to virtually
21 of the royalties.

22 First, as you now well know, more than you

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1 ever wanted to know up to this point, I think, she
2 will describe MPAA's established method for
3 distributing royalties based on viewing. And her
4 testimony establishes that the programming claimed by
5 MPAA companies and other companies represented by MPAA
6 that those programs attracted virtually all of the
7 viewing.

8 Secondly, her testimony will show that the
9 stations showing programming claimed by MPAA
10 represented companies are available to nearly all
11 cable subscribers. And indeed there she will show
12 that programming claimed by MPAA is on stations that
13 generally, virtually, all of the royalties that are
14 paid by cable systems in 1997 were paid.

15 Fourth, her testimony also includes
16 reports of the market value and license fees, ad
17 revenues of programming represented by MPAA, claimants
18 in the broadcast and cable marketplaces, the only
19 truly analogous marketplaces that we have for this
20 marketplace in this room here.

21 And, finally, her testimony will include
22 reports indicating the popularity of MPAA programming

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1 from the perspective of the public.

2 Now, does IPG's case provide any similar
3 evidence? No. Nothing on popularity, nothing on
4 availability, and indeed only a formula that is very
5 much open to question.

6 So we would respectfully submit that MPAA
7 has substantiated its claim for virtually all the
8 royalties, save a very tiny several thousands of a
9 percent that is attributable to IPG's claimants as of
10 today.

11 Now I realize that you can look at that
12 number from two ends of a telescope, and perhaps why
13 quibble over this tiny little percentage point? We
14 have an obligation to our claimants to be sure that
15 royalties are distributed among the program suppliers
16 in a fair and equitable and a transparent way. And we
17 have many questions, and we will seek answers to those
18 questions from IPG today concerning its alleged
19 estimate and entitlement to royalties.

20 Thank you.

21 MR. LUTZKER: Thank you. I'll join Jim in
22 sitting if that's appropriate.

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1 And let me also start by sharing Jim and
2 I go back many years from our early associations when
3 he was at NAB and I was in private practice, and I
4 certainly welcome his participation. I think it will
5 -- not to -- and I'll make a comment about prior
6 counsel for MPAA, but I think certainly Jim will add
7 both grace and stature to the presentation. And I'm
8 torn on the notion of having him as a, in the context
9 in which we are at right now, competitive counsel,
10 because I think he is -- he will bring proper stature
11 and dignity to his position.

12 I also think that other counsel who have
13 represented here over the years, Art Shiner, Dennis
14 Lane in particular, who I've worked for many, many
15 years also, did their utmost in advocating the
16 positions of MPAA during the course of this
17 proceeding.

18 And by way of brief background, I have
19 been involved in CRT decisions involving Phase II
20 proceedings commencing in the 1979 case, actually the
21 sort of a witness to the 1978 case and became an
22 active participant on behalf of clients who at that

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1 point in time looked at the MPAA analysis -- these are
2 established companies, multimedia entertainment,
3 producers of the Donahue and Sally Jessie Raphael,
4 programs which are now part of the MPAA case to the
5 extent that those programs were subsequently 20 years
6 later sold to Universal.

7 Nevertheless, we have seen during the
8 course of both Phase I and Phase II proceedings an
9 evolution in the cases presented, first, to the CRT
10 and then to the CARP. And the evolution involved a
11 gradual focus on and peeling away of the analysis
12 presented by MPAA, because I think, as Jim correctly
13 indicated, they have, from the commencement of this
14 proceeding, determined that a singular formulistic
15 approach to the content that is before you as an
16 agency to divide the royalty distributions, a singular
17 -- single formulistic approach should be applied
18 across the board in Phase I and in Phase II.

19 In the early proceedings, the CRT
20 established the five criteria which remain
21 substantially the criteria that we all try to address
22 today. And in the end it was concluded that no single

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1 formula need be accepted or can be accepted to meet
2 those criteria. The criteria stand as the foundation
3 for the judgment of the panel, and formulas and
4 analyses and expert opinions and gut judgments and
5 other elements address those criteria, but it is the
6 criteria that we are addressing, not a formula.

7 As a result of increased scrutiny during
8 the course of the better part of about the first ten
9 proceedings, from 1978 through the 1986 proceeding and
10 then subsequently in the 1989 and 1990 to '92 cable
11 proceedings, a number of aspects of the MPAA
12 formulation have drawn attention. And it also, as a
13 result of the growth of the cable pool -- when Jim and
14 I were first starting the cable pool amounted to \$10
15 million. It grew in the mid-'80s to over \$200
16 million. Obviously, much more interest and focus is
17 upon a larger pool of money.

18 The thing that has been intuitive
19 throughout my career in working in this area is that
20 the -- and the MPAA's approach at base has an end
21 result. I mean there is an apparent altruism that
22 comes from the designation of program suppliers. But

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1 at base there must be something behind it. And really
2 for the first time, because as has been communicated
3 in pleadings and discussions, never before, never
4 before this proceeding with this individual company
5 has the relationship between ownership shares and
6 ultimately and royalties been even shared. It has
7 never been made available.

8 Why us? Why are we in a position to have
9 access to this information? Well, first and foremost,
10 we ask for it. And, secondly, it is fundamentally
11 part of the case, and particularly part of the Phase
12 II proceeding. And as we go through this proceeding,
13 we will have a better sense as to how royalties are
14 collected and distributed through the MPAA, which by
15 virtue of its position representing the vast, vast,
16 vast bulk of the industry, has taken upon itself to
17 parcel out these funds according to a formula that is
18 worked on and devised.

19 Where does IPG come from? What is its
20 origin? What is its roots? We'll have more
21 information and details about this, but fundamentally
22 there is a growing understanding among not the

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1 universe of program suppliers but a group of program
2 suppliers that they have been receiving an inadequate
3 share of royalties from this tribunal, from this
4 proceeding. Why? They don't necessarily know,
5 because I think as a practical matter most of the
6 proceedings have been draped in -- even with the
7 limited discovery rules that are now extant -- I mean
8 there was less under the CRT procedures -- people
9 don't necessarily know exactly how this system is
10 devised and calculated. Are the results fair? Well,
11 hopefully that will be something that will be tested
12 in this proceeding.

13 While IPG does represent parties, it is
14 not a program producer in and of itself, as is the
15 case -- MPAA is an association of companies. But even
16 within the MPAA grouping there are collection agencies
17 that represent third parties. It is not a unique
18 situation to have a claimant be not the program
19 producer itself but a representative of program
20 producers or program owners or program distributors.

21 Clearly, as has been exhaustively analyzed
22 in this proceeding, IPG made some mistakes in filing

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1 claims, not deliberately, not with intent to
2 orchestrate and deceive, but out of just inexperience,
3 frankly. And hopefully those will be corrected. It's
4 received whatever judgments you've done to date and
5 whatever judgments will come as a result of this
6 proceeding as a result of that. And what is, it is.
7 We will explain the record as clearly as we can, and
8 we'll allow you to make your judgment on that.

9 In addressing the analysis of how to share
10 royalties out of this pool, as IPG approached it, it
11 looked at the criteria of the tribunal; it is a
12 situation of somewhat limited resources at this stage,
13 and its claim, as you can see, is barely more than one
14 percent of the total pool. It's hard to say we're
15 asking for a lion's share of anything. We're asking
16 for a small segment with respect to a series of
17 programs that had been produced, there's no question
18 about that. They've been broadcast, they've been
19 syndicated, and we're just trying to make sure that
20 the parties that we represent get their fair share of
21 the royalties that are publicly collected, publicly
22 distributed.

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1 With respect to the formulation, our
2 attempt is to go beyond a simple ratings analysis and
3 look at a variety of factors that we spell out in our
4 case. And we look at time, we look at stations that
5 are telecasting the programming based upon their
6 carriage. On cable systems and distant
7 retransmission, we look at the revenue that those
8 stations generate. These are factors which are not
9 mysterious unknown. They're catalogued and sourced
10 from the same entity that MPAA receives much of its
11 information.

12 One of the intriguing things for me as we
13 were going through this and sort of the -- as Ms.
14 Kessler's testimony has stated in print, I'm sure
15 she'll reiterate, the task of trying to make this
16 manageable, make the overwhelming project of figuring
17 out how many programs we carry on a distant basis,
18 it's an overwhelming task, and they've determined to
19 select a group of stations around which a composite
20 analysis can be judged is a fine approach.
21 Nevertheless, it turns out that a private entity
22 representing a handful of claimants, accessing the

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1 same companies' data, TV data, was able to elicit
2 information regarding more stations than the MPAA.
3 And it's intriguing, and i think we will go into this
4 in some detail in our presentation, that the data is
5 available, the breadth of the data is available. The
6 importance of having as close to a census is possible
7 for certain circumstances makes sense when you're
8 trying to allocate royalties among all parties who are
9 entitled to it.

10 Historically, MPAA has taken a position
11 that if there is zero viewing in a particular program,
12 you get zero dollars, irrespective of whether your
13 program was broadcast, retransmitted, distantly
14 retransmitted, even distantly retransmitted on a super
15 station. If you have zero viewing, under their
16 analysis, you as a program supplier get zero. Some
17 people may think that's fair; we don't. We think that
18 a system that makes as its hallmark an effort to give
19 everyone who's programming, who's retransmitted a
20 share of the pie, which is consistent in our view with
21 the way the agency has operated in the past, is the
22 way to go.

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1 Do we have a perfect formula? Absolutely
2 not. Can it be criticized? I guarantee you. I could
3 criticize it; anyone in this room could criticize it.
4 It is nevertheless a reasoned judgment as to how to
5 get started in this process. This is our first
6 proceeding. I assure you that as our claims in future
7 years will evidence we will be back. We'll be back
8 representing other companies, more companies, because
9 I think we've hit -- we've touched a cord, a cord of
10 organizations, copyright owners, who realize that
11 assets are out there that haven't been shared
12 properly, and they want a representative to help share
13 more fairly. And that will be the essence of our
14 case.

15 CHAIRPERSON CAMPBELL: Thank you. Mr.
16 Popham, proceed please.

17 MR. POPHAM: Thank you. We're ready to
18 proceed with Ms. Kessler.

19 CHAIRPERSON CAMPBELL: For the record, Ms.
20 Kessler was already sworn in, and do you want her to
21 --

22 WITNESS: I'd also like to make it clear

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1 this is not the property of MPAA; it's mine from my
2 basement. I use it to design quilt squares. As you
3 can see from the cobwebs on it, I haven't been
4 designing quilts.

5 MR. POPHAM: Shall I mark this and submit
6 it.

7 CHAIRPERSON CAMPBELL: I think that would
8 be a good idea. Mr. Lutzker will be marking the
9 exhibit that she drew earlier this morning and it was
10 discussed in prior testimony. Do you want go by names
11 and call it Exhibit 1?

12 MR. POPHAM: IPG Exhibit 1?

13 MR. LUTZKER: Hold on a second. Let's go
14 off the record for a second.

15 (Whereupon, the foregoing matter went off
16 the record at 2:11 p.m. and went back on
17 the record at 2:13 p.m.)

18 MR. POPHAM: Back on the record. So we're
19 ready for Ms. Kessler who is more than ready for us.

20 WITNESS: I was dying to talk this
21 morning. I kept nudging my counsel, "Please let me
22 talk."

1 MR. POPHAM: As was I.

2 WHEREUPON,

3 MARSHA E. KESSLER

4 was called as a witness by Counsel on behalf of
5 program suppliers, having first been duly sworn,
6 assumed the witness stand, was examined and testified
7 as follows:

8 DIRECT EXAMINATION

9 BY MR. POPHAM:

10 Q Now, Ms. Kessler, can you state your full
11 name for the record, please?

12 A Marsha E. Kessler.

13 Q And can you tell us what your position is?

14 A I'm Vice President Retransmission Royalty
15 Distribution for the Motion Picture Association of
16 America.

17 Q And can you describe briefly your duties
18 and responsibilities at MPAA?

19 A I'm the person primarily responsible for
20 receiving and distributing the royalties awarded to
21 program suppliers from the CARP with respect to cable
22 and satellite carrier retransmission royalties.

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1 Q And what has that entailed over the years,
2 Ms. Kessler? Again, briefly on that.

3 MR. LUTZKER: I have just a question of
4 procedure.

5 CHAIRPERSON CAMPBELL: If you don't mind,
6 Ms. Kessler, to wait. Yes, sir, your question?

7 MR. LUTZKER: In terms of -- I don't know
8 where you're going in terms of -- if this is a voir
9 dire for --

10 MR. POPHAM: Yes.

11 MR. LUTZKER: -- introduction. Okay.
12 Then I don't know.

13 MR. POPHAM: Let me just tell you where
14 I'm going.

15 CHAIRPERSON CAMPBELL: Absolutely.

16 MR. LUTZKER: That's fine.

17 CHAIRPERSON CAMPBELL: As long as
18 everyone's clear, then it will be fine.

19 WITNESS: Actually, the witness needs to
20 know where we're going.

21 MR. POPHAM: We will have a brief voir
22 dire.

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1 MR. LUTZKER: Okay.

2 MR. POPHAM: I'll make her available.

3 MR. LUTZKER: That's fine.

4 MR. POPHAM: Then I think we will get to
5 Ms. Kessler's testimony, including directions that we
6 have exchanged.

7 MR. LUTZKER: Okay.

8 WITNESS: Thank you.

9 BY MR. POPHAM:

10 Q In any event, on duties and
11 responsibilities, Ms. Kessler, for example, could you
12 tell us how you provide assistance, if any, to
13 claimants?

14 A Every July I provide information with
15 respect to companies wishing to file their claims. I
16 help prepare evidence for testimony. I've appeared as
17 an expert witness. I have to tell you, I just don't
18 know how many times, but certainly several times among
19 the now defunct Copyright Royalty -- or no, Copyright
20 Royalty Tribunal, CRT, and I believe this is my third
21 -- I think this is third, possibly fourth, but I think
22 third appearance before a CARP panel.

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1 Q Thank you. And how long have you been at
2 MPAA, Ms. Kessler?

3 A Since I was a very young woman, close to
4 20 years.

5 Q About 1982 would have been the start date?

6 A About 1982, February.

7 Q And prior to joining MPAA were you
8 employed?

9 A Right in this building, a couple of walls
10 over. I worked for the very first ever licensing
11 division, which is the division of the Copyright
12 Office responsible for receiving retransmission
13 royalty payments and documents. I was there for about
14 five years. My primary responsibilities were
15 examining documents, corresponding with cable systems.
16 If we found something amiss in their filings, it's so
17 long ago that there were two compulsory licenses, one
18 for cable systems and one for juke boxes. So at one
19 point I was a juke box expert. The juke box
20 compulsory license I believe is -- it may not exist,
21 but it's certainly not administered through the
22 copyright office any longer. And satellite royalties

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1 became a reality after I left the Licensing Division.

2 Q And could you just briefly describe your
3 particular duties and responsibilities when you were
4 employed at the Copyright Office?

5 A Well, like I said, I looked at the
6 statement of account filings in particular. We had to
7 know the old FCC signal carriage rules. So I would
8 look at statement of account filings to determine that
9 cable operators had interpreted the rules correctly,
10 correspond with them if they hadn't filed the rules
11 according to the way we were trained to understand
12 them. I also deposited lots of money. I remember
13 that. In fact, now it's electronic payments, but back
14 then cable operators sent checks in, and they came in
15 on the very last day of the filing period. And we
16 would just spend hours running calculators by hand
17 preparing deposits.

18 Q Thank you. And roughly how long were you
19 employed at the Copyright Office?

20 A I was there approximately five years.

21 Q Thank you. Ms. Kessler, MPAA has
22 previously submitted a document entitled, "Direct

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1 Testimony of Marsha E. Kessler." Was that testimony
2 prepared by you or under your direct supervision?

3 A Yes, it was.

4 Q And that testimony, as originally
5 submitted, included nine exhibits; is that correct?

6 A Yes, it did.

7 Q Thank you. And are those -- at the time
8 that you submitted those documents were they true and
9 correct to the best of your knowledge?

10 A Yes, they were.

11 Q I think at this point it would be
12 appropriate then to stop and provide Mr. Lutzker an
13 opportunity for any voir dire he may have.

14 MR. LUTZKER: Thank you.

15 VOIR DIRE

16 BY MR. LUTZKER:

17 Q Ms. Kessler, where did you go to school?

18 A Pataba College, Salisbury, North Carolina.

19 Q And what was your degree?

20 A I have a Bachelor's degree in Spanish
21 language and literature.

22 Q And during the course of your employment

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1 with MPAA, you worked with Alan Cooper in connections
2 with these proceedings. Is that clear?

3 A That's right.

4 Q And how would you characterize your
5 responsibility and his responsibility and also if
6 there were any other people at MPAA that you worked
7 with at that point in time?

8 A The first year, which would have been
9 1982, was sort of a training year for me. I came
10 there -- actually, when I came there I was the person
11 who knew signal carriage rules the best, so that was
12 one asset that I brought to MPAA. I had at that time
13 no exposure to viewing type analysis or accounting or
14 statistics or anything like that. In the years that
15 have passed since then, I certainly have learned a lot
16 more about viewing data than I ever dreamed I would
17 when I was in Salisbury, North Carolina learning
18 Spanish.

19 Q Have you taken any courses or --

20 A Yes. I've taken --

21 Q What courses have you taken?

22 A I've had three courses in statistics.

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1 I've had a single course in economics. I've had a
2 single course in cable television.

3 Q Where have you had these?

4 A Statistics, I had at George Mason
5 University. I didn't have three; I had two. I had
6 two courses in statistics, one course in economics,
7 University of Maryland; one course in cable
8 television, University of Maryland; one course in data
9 processing, University of Maryland.

10 Q Did these lead to any degrees?

11 A No.

12 Q In terms -- do you consider yourself an
13 expert in statistics?

14 A Absolutely not.

15 Q And you're not being held out by MPAA,
16 it's your understanding, as an expert in statistics.

17 A I'm not, but I certainly have been looking
18 at statistical data long enough to be able to form a
19 reasoned opinion on it.

20 Q So you are an expert?

21 A I am not an expert.

22 Q In terms of your other responsibilities

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1 with respect to the claimant pool, you indicated that
2 you provide information to claimants in July. Would
3 you describe briefly what you do there?

4 A Certainly. The Copyright Office rules are
5 very strict regarding the filing of claims. In order
6 for a company to receive royalties, it must first file
7 a claim with the Copyright Office during the month of
8 July. The claims are filed in the July after the
9 period. So for example, the 1997 claims were filed in
10 July of 1998. I prepare a memorandum that goes out in
11 advance that says, "Please remember to file your
12 claims." Let's see, what does it have in it? It says
13 you have to do it during July. We provide two forms,
14 one for a single claimant and one for a claimant that
15 files on behalf of itself and others.

16 Q It's not necessary to go through the form.
17 But in other words, you provide that. And during --
18 that gets sent out. And then do you go to the
19 Copyright Office and review the claims once filed?

20 A Yes, I do.

21 Q Do you contact companies after claims are
22 filed?

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1 A Yes.

2 Q And do you offer corrections to their
3 claims?

4 A No.

5 Q Okay. In terms of Nielsen Company, do you
6 have any personal dealings with the Nielsen Company?

7 A I order a special study from them and I --

8 Q When you say you order a special study, is
9 this a study that you have created?

10 A I don't understand the question. Let me
11 tell you what I order, and maybe it will help you with
12 your question.

13 Q No, let me rephrase this. In terms of the
14 special study, do you advise -- am I correct in
15 understanding that a special study had been prepared
16 under Mr. Cooper's background and experience, and you
17 now order an updated version of that study?

18 A Correct.

19 Q Okay. Do you change the study in any
20 respect?

21 A I don't think so, but let me just -- can
22 you give me a hint. Is there something special you're

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1 looking for?

2 Q No, no. I just -- you are not composing
3 the study. You are ordering the study similar to --

4 A The repeat of -- right, a repeat of the
5 previous study.

6 Q Let me go back for one second. You said
7 you had taken a variety of courses. What were your
8 grades in these statistical courses?

9 A I got a B and a B.

10 Q A B and a B. In terms of TV data, do you
11 communicate with TV data?

12 A Not often. I would say every couple of
13 years possibly. We have a standing order with them.

14 Q Do you review TV data logs in connection
15 with your responsibilities at MPAA?

16 A No.

17 Q Do you assess the status of programs based
18 upon the CRT/CARP division between local, syndicated,
19 sports, devotional, Canadian? Do you make any
20 judgments with respect to that information?

21 A Within what context?

22 Q Within the context of your

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1 responsibilities at MPAA.

2 A I don't understand.

3 Q Do you have any responsibility for --

4 A Categorizing programs?

5 Q -- categorizing programs in the various
6 categories that are relevant to this proceeding?

7 A I would say not directly, and I haven't
8 had for some time. The rules for the categorization
9 of programming have evolved over a period of years, I
10 believe they're now set in stone. I'm just trying to
11 think who does do the categorization. I believe Cable
12 Data does the categorization.

13 Q But am I correctly inferring that you do
14 not consider yourself an expert in categorization of
15 programming?

16 A No. I consider myself an expert in
17 categorization.

18 Q Would you repeat that, please?

19 A I consider myself an expert in
20 categorization.

21 Q You do consider yourself an expert --

22 A Absolutely.

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1 Q -- in categorization of programming.
2 Okay.

3 CHAIRPERSON CAMPBELL: Before we go any
4 further, I would like to ask a couple of questions for
5 clarification. Mr. Cooper ordered a study. Was he
6 your predecessor in that position at MPAA?

7 WITNESS: He was my boss. I went to work
8 there in 1982. We had used -- the very first
9 proceeding ever was from 1978. I believe beginning
10 the 1979 proceeding, I hope I'm right about this, we
11 ordered the first Nielsen study, and it was Mr. Cooper
12 who designed the study that takes into account the
13 fact that distant signals are important, that they
14 reach the highest number of subscriber, and that
15 responds directly to the objectives of 111, which are
16 to compensate for the use of programming. That has
17 been our standard for distribution since that time,
18 and it has been our standard for evidence in our cases
19 before the CRT and the CARP.

20 CHAIRPERSON CAMPBELL: At one point, when
21 you mentioned special study, you wanted to elaborate.
22 I would like you to explain what is meant by the

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1 special study.

2 WITNESS: Okay. May I draw?

3 CHAIRPERSON CAMPBELL: Go ahead.

4 WITNESS: Okay. I haven't thought about
5 this in advance. When we order a special study from
6 the Nielsen Company, we provide them with a listing of
7 stations that we have picked and ask them to provide
8 data for us. Generally, our -- not generally -- our
9 selection of stations is based on the stations that
10 are most heavily carried by Form 3 cable systems,
11 which, as I'll explain later, are the largest cable
12 systems.

13 What Nielsen returns to us is for each
14 station on a quarter hour by quarter hour basis, or a
15 15-minute by 15-minute basis, for all of the stations
16 in the sample is I think three pieces of information:
17 The name of the program, the date and time that it
18 ran, and the average number of cable households that
19 actually viewed the program outside the local market
20 of the broadcast station.

21 Nielsen does some program categorization
22 so that each program can be assigned to one of seven

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1 categories. For example, if the program were a local
2 program like our local news, weather, so forth, we
3 might put a -- we would make a notation this is a
4 local program. If the program were a movie like Ben
5 Hur or Titanic, whatever, we'd make a notation, movie.
6 If the movie were a series like Seinfeld, we'd
7 categorize it series. If it were a major sport, and
8 by that we mean a play by play, live Major League
9 Baseball, NCAA, National Hockey League, NFL, and other
10 major sports, we'd put them in the sports bracket. If
11 it were what we call a religious program or devotional
12 program, we would make a notation of that. If the
13 program were broadcast by a public broadcasting
14 station, we'd make a notation of that. And then
15 there's a category called "All Other." All other is
16 programming that we don't know what it was. It will
17 generally carry a notation TBA, to be announced, or
18 filler, rain delay. We make every effort to figure
19 out what that programming may have been. In the final
20 analysis there is always programming that we don't
21 know what the station ran.

22 So the purpose of the entire study is so

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1 that we can look at viewing to categories of
2 programming. The viewing to series and movies
3 relative to the viewing of sports. The viewing -- of
4 course, we're interested in our category -- the
5 viewing of series and movies relative to the viewing
6 of public broadcasting and so forth.

7 So when we get the data from Nielsen, it
8 is the count of households, program names, and the
9 average number of distant cable households that
10 actually watched the program. I will go into this
11 more later, but the Nielsen data, as Mr. Lutzker has
12 pointed out, are from diaries that are place
13 nationwide four months a year for some markets, six
14 months a year for other markets. So the data from the
15 Nielsen study are related to our categories of
16 programming broadcast during the year for the periods
17 for which Nielsen has diary data.

18 CHAIRPERSON CAMPBELL: Thank you very
19 much.

20 DIRECT EXAMINATION

21 BY MR. POPHAM:

22 Q Now, Ms. Kessler, since your original

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1 testimony was submitted, have you become aware of any
2 changes or corrections that need to be made to assure
3 that your testimony rings true and correct?

4 A Yes, I have.

5 Q And can you describe those corrections or
6 changes?

7 A At the time I wrote the testimony, which
8 was in spring of last year, we had not gone through
9 the process of having companies certify the programs
10 to which -- for which we were prepared to pay them
11 royalties. So in the preparation of my testimony, I
12 had to rely on the most current ownership data that I
13 had available, which was the ownership database as it
14 existed for the previous year distribution, 1996
15 cable.

16 In the months that have passed since then,
17 two things have happened -- three things have
18 happened. One, we've completed the certification
19 process. The companies have certified the title as to
20 which they're entitled to receive royalties. We've
21 gone through an internal review. And I forgot the
22 third thing. We certified the titles, the internal

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1 review -- oh, we had been paid a large portion of the
2 '97 fund, and we've paid the monies out.

3 CHAIRPERSON CAMPBELL: What do you mean by
4 internal review?

5 WITNESS: We have our distribution audited
6 to assure that the viewing hours have been calculated
7 correctly, that we have honestly accounted for all
8 monies that came to us as well as expenses charged
9 against the distribution, and that the methodology as
10 described in our representation agreement has been
11 executed appropriately.

12 CHAIRPERSON CAMPBELL: Thank you.

13 BY MR. POPHAM:

14 Q Now, Ms. Kessler, you have revised your
15 testimony in writing, I believe.

16 A Yes, I have.

17 Q And we have provided that to the CARP and
18 to Mr. Lutzker. Do you have a copy in front of you?

19 A Actually, I do.

20 Q Now, we are happy to provide copies again
21 if the CARP finds it necessary or appropriate.

22 CHAIRPERSON CAMPBELL: Do you have some

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1 that are numbered all the way 1 through 104?

2 BY MR. POPHAM:

3 Q If I might approach Ms. Kessler.

4 Ms. Kessler, I'm showing you a document
5 consisting I believe of three pages marked page 9
6 revised, page 9A, and page 9B.

7 A Yes.

8 Q And these are the corrected pages that we
9 have previously provided. Is that correct?

10 A That is correct.

11 CHAIRPERSON CAMPBELL: Does this have an
12 amendment to the directed testimony of Marsha E.
13 Kessler?

14 MR. POPHAM: It is actually an amendment
15 to the direct testimony that is a replacement page 9,
16 accompanied by page 9A and 9B. Now if it's more
17 convenient, we are certainly happy to mark it as a
18 separate exhibit.

19 CHAIRPERSON CAMPBELL: I don't think this
20 needs to be bound in the transcript. It is already in
21 the filings of the Copyright Office.

22 ARBITRATOR DAVIS: We might as well just

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1 bind it anyway.

2 CHAIRPERSON CAMPBELL: Very well then.

3 ARBITRATOR DAVIS: What do you want to
4 call it?

5 CHAIRPERSON CAMPBELL: Call it Docket
6 2000-2 CARP, CD93-97, Phase II. Amendment to Direct
7 Testimony of Marsha E. Kessler, dated January 2, 2001.
8 That way, should it be amended any other time, this
9 will be obviously the January 2 amendment.

10 THE WITNESS: I certainly hope there are
11 no further amendments.

12 MR. POPHAM: Does the CARP at this point
13 need to entertain a motion to admit this to the record
14 or is this covered as the original testimony, is
15 basically going into the record of the proceedings?
16 We are certainly prepared to make a motion for this
17 and various accompanying exhibits if need be.

18 CHAIRPERSON CAMPBELL: Do you have any
19 objection to having it go right in?

20 MR. LUTZKER: No.

21 CHAIRPERSON CAMPBELL: Thank you.

22 BY MR. POPHAM:

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1 Q Ms. Kessler, I believe also in front of
2 you are revisions to Exhibit 3. Is that correct?

3 A That is correct.

4 Q Are the related corrections to exhibit 3,
5 that's just now been marked exhibit 3 revised, are
6 those true and correct now to the best of your
7 knowledge?

8 A Yes, they are.

9 Q Can you briefly describe the revisions?
10 Well, let me get all three of these referred to.

11 A Okay.

12 Q You also have before you a document marked
13 Exhibit 3A, I believe?

14 A That's right.

15 Q Briefly describe what exhibit 3A is, since
16 it differs a little in format from the original
17 exhibit 3.

18 A Certainly. When I filed my testimony in
19 April, like I said, we had not yet gone through the
20 certification process with our represented companies.
21 We have since gone through that process, and in doing
22 that, we determined that there were some titles for

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1 which we no longer assert a claim. We also discovered
2 that there are other titles for which we assert a new
3 claim.

4 The exhibit 3A defines the titles for
5 which we are adding and the titles that we have
6 withdrawn from our claim.

7 Q Referring now, Ms. Kessler, to exhibit 3B,
8 which I believe is also before you, and also has been
9 previously --

10 A Actually -- hold on. I'm sorry. I
11 thought I didn't have a complete exhibit here, but I
12 do. I'm sorry. Go ahead.

13 Q Looking now to Exhibit 3B.

14 A Yes. As I said, when I had originally
15 filed the testimony, the companies had not yet
16 certified the titles for which we would pay them
17 royalties. We had not undergone the review of the
18 database.

19 During that process, our, as I have said,
20 our list of titles has changed. We also discovered a
21 small computer glitch that needed to be corrected in
22 order to calculate the household viewing hours

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1 correctly.

2 The result of that is that I needed or I
3 felt like I needed to restate the relative shares of
4 MPAA's claim to IPG's claim, and also to call
5 attention to the fact that there are some titles for
6 which both parties claim entitlement.

7 Q And also, Ms. Kessler, does this list also
8 reflect the fact that several of the claims of IPG
9 have been dismissed in the course of the proceeding?

10 A Yes, it does.

11 Q Are exhibit 3 revised, 3A and 3B, at this
12 point now true and correct to the best of your
13 knowledge?

14 A Yes, they are.

15 MR. POPHAM: Again we would, if necessary,
16 make motion to include them.

17 CHAIRPERSON CAMPBELL: Do you have any
18 objections, Mr. Lutzker?

19 MR. LUTZKER: I guess maybe what I'll do
20 is I'll reserve an objection. I don't want to sort of
21 interfere too much with Jim's presentation now.

22 In light of all the back and forth that we

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1 had with respect to discovery, with respect to
2 delivery of documents underlying material, to receive
3 a substantial document of this nature -- I mean we got
4 it -- it was dated the second and I assume we got it
5 the second. To receive a document within seven days
6 of the commencement of the proceeding, to the extent
7 that there are material changes, I don't yet know
8 whether it's fair to sort of bring this in.

9 It may be that the changes are reasonable
10 and of minor note, and maybe even more substantial.
11 There certainly has been no effort at providing any
12 sort of source material to us or at least relating it
13 to this material. Obviously when you receive material
14 on the fourth, and if there's an integration of all
15 that dated information, it would be helpful to know
16 that. I would qualify any objection I would have
17 based upon that.

18 Ms. Kessler also identified a glitch with
19 respect to something dealing with viewing hours that's
20 not explained or separately identified. Obviously it
21 can be subject to cross examination. Whether there's
22 any additional limitations in our ability to cross

1 properly on that, I can't say at this point.

2 So I would just note again, I think it's -
3 - I respect the fact they want to sort of update their
4 record for this purpose, but I do have a concern that
5 a whole host of a large volume of materials has been
6 introduced at the very last minute.

7 CHAIRPERSON CAMPBELL: Perhaps through
8 your testimony it will be that although this might be
9 referred to as a redlined version, you could along the
10 way let us know, particularly with the revised exhibit
11 3, the larger one, whether there is a wide body added
12 or subtracted or whether there are a few things. That
13 might be something that you are planning to discuss
14 anyway in your testimony.

15 The exhibit 3A is in and of itself self-
16 explanatory. The exhibit 3B, I am sure will be
17 further explained in your testimony.

18 So perhaps if you want to reserve that
19 objection.

20 MR. LUTZKER: I do. I just had one -- you
21 referenced a redlined version.

22 CHAIRPERSON CAMPBELL: No. I said it's

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1 not.

2 MR. LUTZKER: It's not redlined.

3 CHAIRPERSON CAMPBELL: That would be
4 referred to as a redlined version, and therefore
5 perhaps in her testimony she'll go through it in a way
6 that we could see what we might have seen in a
7 redlined version.

8 THE WITNESS: I'll try.

9 MR. POPHAM: And I think it is fair to say
10 that actually 3A and 3B are a means of providing a
11 more detailed review of exactly how 3 revised was
12 developed out of 3 originally, what's been added and
13 subtracted. So hopefully much of the explanation is
14 already in the course of the exhibits.

15 I believe, subject to Mr. Olaniran telling
16 me otherwise, that the underlying documents that were
17 provided in the past week relate to the numbers as
18 have been revised in the corrected testimony.

19 MR. OLANIRAN: Yes.

20 BY MR. POPHAM:

21 Q Ms. Kessler, let us look at page 9.

22 A Old page 9 or new page?

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1 Q No. Let's look at new page 9. In light
2 of the Chairperson's concern, if you could just as
3 briefly as possible, indicate where the changes have
4 been made in page 9 as it relates to I guess viewing
5 share, in particular.

6 A With respect to the viewing share, I have
7 restated the household viewing hours attributable to
8 both the MPAA claimed programming as well as household
9 viewing hours attributable to titles claimed both by
10 MPAA and IPG, as well as the percentage attributable
11 to the MPAA group.

12 The MPAA programming is now 3,476,221,654,
13 which is 99.9698 percent of the total 3,477,272,694.

14 Let's see. What else is different about
15 that page. I had made an error regarding a reference
16 to an exhibit. I had it marked, but now I can't
17 figure out --

18 Q Just to help you along, might I call your
19 attention to the reference, to Exhibit 5 on page 9.

20 A On old page 9, beneath the statement of
21 the percentage share, I had a concluding sentence in
22 the next paragraph. The statement is also

1 corroborated by the analysis found in MPAA Exhibit 5.
2 That should be Exhibit 7.

3 Q Should that same correction be made on the
4 next slide?

5 A Yes. MPAA Exhibit 7, measures the distant
6 subscribership and royalty payments.

7 Q Any other corrections on page 9?

8 A No.

9 Q Now, Ms. Kessler, any other corrections to
10 any other pages of your testimony?

11 A Minor grammar and typos. I have a list.
12 On page 5, the first full paragraph, that begins
13 "Retransmission royalties attempt," if you look at the
14 next-to-the-last line in that paragraph, I made a
15 grammatical error. It should say, "The evidence and
16 prior distribution proceedings has focused."

17 Q Thank you. Any other corrections?

18 A Yes. On page 7, I was giving examples of
19 the kinds of programs in our claim. Under
20 instructional programs, I listed Jack Hanna's Animal
21 Adventures. We no longer assert a claim to that
22 program. That program should be deleted.

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1 Q I assume then that deletion should also be
2 made on Exhibit 5?

3 A That is correct.

4 Q Any other corrections?

5 A Yes. On the following page 8, second full
6 paragraph, next-to-the-last line, "agreement, every
7 year MPAA orders from" strike the word V.

8 Page 14. The last full paragraph, which
9 begins, the first list, and MPAA exhibit 9. If you go
10 down three lines starting with the line "indicates."
11 The line should read, "Indicates that voters (viewers)
12 made their selections from" -- strike the word "only."

13 Continuing on the next line, "and variety
14 shows" -- strike the words "that were eligible and
15 shows."

16 Q You mean were eligible and shows, I don't
17 believe --

18 A I'm sorry, yes. Strike the words "were
19 eligible and shows." Replace them with the word
20 "that."

21 I just have one more. On Exhibit 1, page
22 2. We had indicated that Gomat SA is a represented

1 company. We do not have a representation agreement
2 with them. That company should be deleted from the
3 list.

4 Q Thank you, Ms. Kessler. Any other
5 corrections?

6 A Not to my knowledge.

7 Q Now that we know who you are and what you
8 really meant to say, can you tell us why are you here?

9 A I am here to talk about the compulsory
10 license, how it works, how cable systems make
11 payments, and to look at the compulsory license for
12 the retransmission of broadcast stations by cable
13 systems, and evaluate the claims of the MPAA group
14 relative to the IPG group with respect to the license.

15 Q As they say on ER, Ms. Kessler, can you
16 just give us the bullet on MPAA's claim?

17 A I'm sorry, I didn't hear.

18 Q Can you just give us the bullet on MPAA's
19 claim?

20 A I hope I don't take a bullet on MPAA's
21 claim.

22 Essentially we will look at various

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1 criteria as ways of approaching, of measuring relative
2 value of the MPAA claim relative to the IPG claim. We
3 will first look at distant signal viewing. When we
4 look at that, we'll see that the MPAA group gets well
5 over 99 percent of all viewing.

6 We will look at the broadcast stations
7 that were retransmitted by cable operators during
8 1997. We will see that the stations that ran the MPAA
9 programs were available to over 99 percent of all
10 distant subscribers during 1997.

11 We will look at broadcast stations upon
12 which the MPAA programs have been aired. We will see
13 that they represent over 99 percent of all funds paid
14 in.

15 We will look at analogous market places
16 like cable networks and broadcasts. We will look at
17 the fees that our companies generated in terms of the
18 sale of programming to stations and advertising fees.

19 Finally, we'll look at websites where the
20 website public went in and voted on programs that were
21 of the most value to them.

22 Again, regardless of which criterion we

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1 used to evaluate programming, we'll see that the MPAA
2 group is by far the programming that is most heavily
3 prized and used by the distant subscriber public.

4 Q Thank you. Just to add a little context
5 to our proceeding today, can you briefly, which may
6 not be possible, give us an overview of section 111,
7 which is the Cable Television Statutory Copyright
8 License?

9 A Certainly. Effective with the 1976
10 Copyright Act, Congress believed that it was fair to
11 make royalties available to the owners of programming.
12 When that programming had been licensed to a free
13 over-the-air television station, and that station was
14 picked up and retransmitted to a new group of
15 subscribers who wouldn't have had access to the
16 programming but for that retransmission.

17 The Act went into effect, and the
18 royalties first began, as I said before, in 1978.
19 Some of the thinking behind the Act was that when the
20 owners of programming attempt to license a television
21 program to a broadcast station, we are competing with
22 other stations that may be brought in via cable.

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1 So, for example, if I own Seinfeld and I'm
2 trying to sell it to a broadcast station here in
3 Washington, D.C., if the Washington, D.C. cable system
4 carries Seinfeld from some other television market,
5 well, then the audience is fragmented.

6 What that means for me as the program
7 supplier is I can't get as high a price for my program
8 because of the importation of the program from a
9 distant signal.

10 If I am the broadcaster, I can't sell my
11 advertising time on that show for as high a price
12 because the eyeballs that want to see that show can
13 choose to see it via the local station or via the
14 distant station. If they watch the distant station,
15 they'll see distant station commercials. So an
16 advertiser is not as likely to pay top dollar for
17 advertising space.

18 Q So Congress decided that cable systems
19 should pay, but they did not impose what we would call
20 normal copyright liability. Can you just tell us why
21 they chose to go with a statutory license?

22 A In the view of the Congress, they thought

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1 that it would be too burdensome for copyright owners
2 to negotiate one-on-one with broadcast stations. So
3 they saved us all that trouble by creating section 111
4 of the Copyright Act, which provides the statutory
5 rate and the provisions that cable systems must comply
6 with.

7 Q I dare say that perception is not one that
8 MPAA as an organization has ever agreed with?

9 A No. We never have. I can't tell you how
10 many times I have testified that it should be
11 abolished. It makes me nervous as all get out to
12 testify to something that would abolish my job, but
13 nonetheless, we believe that a free marketplace would
14 be the appropriate forum.

15 The cable networks are able to negotiate
16 for programming. We believe that the same could be
17 devised for broadcast stations as well.

18 Q Thank you. Now speaking a little bit
19 about how the statutory license mechanism works, what
20 does a cable system have to do to take advantage of
21 the statutory license?

22 A The cable system has to do one activity

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1 twice a year. It has to file a document called a
2 Statement of Account, or an SOA. There's going to be
3 a lot of buzz words with this. I apologize in
4 advance. Twice a year with the Copyright Office in
5 which the operator says the same, the communities
6 served by the cable system, number of subscribers, the
7 stations they carry, whether they are distant or
8 local, number of channels with broadcast stations,
9 gross receipts, and a signature.

10 Then there's all kinds of accompanying
11 schedules, depending on various circumstances by which
12 they calculate the fee. This is accompanied by a
13 royalty fee payment that as I said, now comes in
14 electronically, though it didn't in my day.

15 Q Ms. Kessler, I believe there are various
16 sizes of cable system which we refer to now by the
17 particular form numbers. Could you just illuminate
18 that just a little bit?

19 A Certainly. Cable systems can be known as
20 big medium and little, or form 1, form 2, and form 3.
21 Mostly we refer to them as forms 1, 2, and 3. The
22 form designation refers to the form that the cable

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1 operator uses to file a royalty fee payment.

2 The smallest group of cable systems are
3 the form 1 cable systems. These systems make a
4 payment of \$28 every six months, or \$56 annually.

5 The next group of cable systems, the form
6 2s, I don't recall right off the ceiling, but I know
7 that their payments range between \$28 and cents, and
8 about \$2,200 every six months.

9 The largest group of cable systems, both
10 in terms of revenues, in terms of subscribers, are the
11 form 3 cable systems. The numbers I was giving you
12 were for 1997.

13 For 1997, the least amount a form 3 cable
14 system paid was around \$2,600. The most amount one
15 paid was about \$5.3 million for the privilege of
16 carrying these broadcast stations.

17 Q Ms. Kessler, what type of system would
18 represent the largest group of subscribers?

19 A That would be the form 3 cable system.

20 Q I believe you prepared a document which
21 has been submitted as MPAA Exhibit 2 to your
22 testimony. Could you just briefly describe what that

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1 exhibit shows?

2 A Certainly. Exhibit 2 is entitled
3 Subscribers and Royalties, 1997 Cable Royalty Fund.
4 The data are divided into three categories, the third
5 category being summarized in a box at the bottom.

6 I mentioned before that cable operators
7 make two payments a year. These cover the periods
8 January through June, and in the case of 1997, just in
9 the lingo, we call that 97-1. The payments for the
10 second half of 1997, July through December, we would
11 call 97-2.

12 If we look at the data on the top third of
13 the page for 97-1, there are two lines of data. The
14 first line describes subscribers for 97-1. With
15 respect to form 1 cable systems, form 1 cable systems
16 accounted for 1.9 million subscribers. With respect
17 to form 2, the form 2 cable systems served 5.2 million
18 subscribers. With respect to form 3, the number is
19 just as you can see, huge in comparison, 56.2 million
20 subscribers out of a total of 63.3 million
21 subscribers.

22 The royalty line, form 1 royalties were

1 196,000 for 97-1. Form 2 royalties were 2.4 million.
2 Form 3 royalties were 73.2 million out of a total of
3 75.9 million. So again, you can see that in terms of
4 the fees generated by the form 3 systems, that they
5 are huge relative to the royalties generated by the
6 other two.

7 The middle line of data or the middle
8 section of data is just the reporting of the same
9 information with respect to 97-2. The bottom
10 information in the box, total subscribers and
11 royalties, 1997 sums or adds up the two accounting
12 periods into one.

13 If you look at the subscriber data, you
14 see that in 1997, there was a total of 127 million
15 subscribers to cable television. Of those 127
16 million, 3.8 million or less than three percent were
17 subscribers to form 1 cable systems. Ten million or
18 just under eight percent, were subscribers to form 2
19 cable systems. Form 3 cable systems accounted for
20 almost 90 percent of all subscribers or 113 million
21 out of 127 million.

22 If you look at the next section of data

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1 regarding royalties, you'll see that there was a total
2 of \$153 million in royalties paid by cable operators
3 for 1997. Of that amount, less than a quarter of a
4 percent were paid by form 1 cable systems, or
5 \$383,000.

6 Approximately three percent of the royalty
7 pool came from form 2 cable systems or \$4.8 million.
8 Again, you can see that the form 3 cable systems
9 accounted by far -- made the largest contribution to
10 the royalty pool, 96.5 percent or 47 million out of
11 \$153 million.

12 Again, you can see that in all of these
13 data it is the form 3 cable systems who provide the
14 widest audience to syndicated programming and whose
15 contribution is the bulk of the royalty pool.

16 CHAIRPERSON CAMPBELL: May I ask a
17 question for clarification? So in the form 3, we not
18 only have the largest cable systems, but the aggregate
19 is the largest number of subscriber base as well?

20 THE WITNESS: That is correct.

21 BY MR. POPHAM:

22 Q Now, Ms. Kessler, I believe the form 3

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1 systems, unlike form 1 and form 2, pay royalties on
2 the basis of among other things, the number of distant
3 signals that they carry? Could you just describe how
4 a cable system determines when a signal is a distant
5 signal and when a signal is a local signal?

6 A Certainly. I'm going to go back to my
7 board again. First of all, let me say that it is a
8 convoluted set of rules. There are two sets of rules,
9 one set that's not in effect any more that is used by
10 cable legislators. The second set of rules that is in
11 effect that is also used.

12 Let me go over first of all the set of
13 rules that's no longer used. In honor of my new
14 counsel from Louisiana, I have picked New Orleans as
15 my city. You can see that I did not go to school in
16 art.

17 Under the FCC's rules that are no longer
18 in effect -- let's see, how can I describe this -- a
19 market is defined by a 35-mile zone that is described
20 around a very specific geographic point in a city. So
21 what I have intended to draw here is a 35-mile circle
22 around the city of New Orleans.

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1 Under one of the old FCC rules, is if a
2 cable operator served a community located here, it
3 could carry all of the New Orleans signals as local
4 because it was operating within the market of New
5 Orleans.

6 If a cable operator served a community
7 located here -- by the way, these are supposed to be
8 counties. I forgot to tell you that.

9 Q She means parishes.

10 A Parishes, that's right. I'm sorry.
11 Parishes. If the cable operator served a parish
12 located down here, and was carrying a New Orleans
13 signal, in the absence of any other conflicting rule,
14 the cable operator would have to pay for the carriage
15 of a New Orleans signal.

16 Again, the reason is because when I sold
17 Seinfeld to a New Orleans station, I sold it based on
18 the market here. A new set of eyeballs, a new set of
19 viewers got access to Seinfeld who wouldn't have had
20 it otherwise. That is why the royalty kicked in.
21 Okay? That's one of the rules.

22 Another rule is something called

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1 significantly viewed. Significantly viewed is a
2 standard that is defined in the old now defunct FCC
3 rules that says if a station achieves a certain level
4 of viewing over X number of days in a week, X number
5 of weeks in a month, it can be called significantly
6 viewed. It's an examination that is undertaken by the
7 broadcast station. The broadcast station goes to the
8 FCC, gives up its data. The FCC agrees. It says
9 okay, you are significantly viewed.

10 In the case I just gave you, if a New
11 Orleans station went and did a measurement here and
12 determined that it was significantly viewed.

13 Q Since the reporter doesn't necessarily
14 know where you are pointing in relation to the
15 picture, if you could describe somehow where "here"
16 is.

17 A (No response.)

18 CHAIRPERSON CAMPBELL: Can we call it the
19 viewing circle or inside.

20 THE WITNESS: I'm sorry. I didn't mean to
21 be unclear. If the cable operator located in this
22 county, which is outside the 35-mile specified zone,

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1 were carrying a New Orleans signal that had been
2 deemed significantly viewed by the FCC, then the cable
3 operator could carry that station as a local station
4 and would not incur copyright liability for its
5 carriage.

6 I'm going to go to one more set. Another
7 buzz word is Grade B contour. A Grade B contour is a
8 -- I have drawn it here as a circle. It can actually
9 be -- in Denver, they go like that. But what it is is
10 a prediction of signal strength. It's a prediction of
11 an acceptable quality of picture within a certain
12 geographic area. It is also an engineering study
13 undertaken by television stations.

14 Under certain market conditions, let's say
15 this is Frederick, Maryland, which happens to be my
16 hometown, if there were a television station in
17 Frederick, which there's not, but if there were, a
18 cable system serving any community within this Grade
19 B contour, because of the market situation, would be
20 allowed to carry the Frederick station as a local
21 station, and would not incur a royalty fee payment for
22 it.

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1 Up here is Hagerstown. If Hagerstown were
2 located outside the Grade B contour and it wanted to
3 carry the Frederick station, it would incur a
4 copyright fee for the carriage of that station.

5 By the way, what I have been talking about
6 today are signal carriage rules for commercial
7 stations. There are additional rules for the carriage
8 of PBS stations, but since PBS programming is not an
9 issue here, we don't need to talk about that.

10 Going back to my first example -- okay,
11 those are the FCC rules. Those are the rules that are
12 no longer in effect at FCC, but cable operators are
13 allowed to use them to determine distant versus local.

14 One other designation, and this is one
15 that went into effect the second accounting period of
16 1994, is the concept of ADI, another buzz word.

17 ADI is an acronym for area of dominant
18 influence. It is a designation by Arbitron. Arbitron
19 used to do rating measurements for television.
20 Currently they just do rating for -- not just, because
21 I love radio, but they are limited to doing ratings
22 for radio. However, the ADI standard was adopted.

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1 What it is is Arbitron assigned every
2 county in the United States to a particular market.
3 So, for example, if we're looking at the viewing to
4 all the television stations in the area by television
5 viewers in Louisiana, if they determined that the
6 people in this parish watched signals from New Orleans
7 more than signals from any other market, they would
8 say that this county was in the New Orleans ADI.

9 CHAIRPERSON CAMPBELL: Ms. Kessler, you
10 were pointing to a county outside of that geographic
11 circle.

12 THE WITNESS: That is correct.

13 Again, if I were a cable operator, I would
14 be delighted because absent anything else, I might
15 have had to pay for the carriage of a New Orleans
16 signal. But because of this county being considered
17 part of the New Orleans ADI, it can carry the signal
18 as a local signal and not have to pay royalties for
19 it.

20 If I went further out to a parish over
21 here, maybe -- I hope geographically this is right --
22 but if Baton Rouge is over here. It is most likely

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1 that this county would have been grouped with the
2 Baton Rouge ADI and the carriage of a New Orleans
3 signal in a parish over here would be distant. The
4 cable operator would have to pay a royalty for it.

5 I think I covered it all.

6 BY MR. POPHAM:

7 Q I believe so. Just for clarity, the cable
8 systems pay for carrying local signals?

9 A No. The formula is for distant signals.

10 Q Again, in the formula there is a
11 distinction made between various types of stations
12 that are carried. Can you tell us how different sorts
13 of stations are treated?

14 A Certainly. Going back to the board.
15 Maybe I'll get an interesting quilt design out of all
16 of this drawing.

17 Again, we're talking about commercial
18 stations here. The copyright law, for purposes of our
19 discussions in these hearings, recognizes independent
20 stations which have no affiliation and network-
21 affiliated stations.

22 For the purposes of Section 111, even

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1 though we may have a different understanding, network
2 is limited to ABC, CBS, and NBC. In terms of the
3 carriage of Fox-affiliated stations, Warner Brothers-
4 affiliated stations, or UPN, United Paramount
5 stations, those are considered independent stations
6 for purposes of royalty fee calculation.

7 Q Now what distinction is made in the
8 royalty calculation as between independents and
9 network stations?

10 A When the cable operator goes to -- a form
11 3 cable operator goes to calculate a payment, there is
12 an artifast, another buzzword called a DSE. It's a
13 distant signal equivalent. It's a value assigned to
14 the carriage of individual stations.

15 Independent stations get a full point or
16 one DSE. Network-affiliated stations get a quarter of
17 a point, or .25 DSE. When the cable operator -- I
18 have to step in front of this for just a minute --
19 let's just say in a hypothetical we have a cable
20 operator that carried two independents and three
21 network-affiliated stations. He would have a total of
22 2.75 DSEs upon which to make a royalty calculation.

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1 There are several schedules of payment.
2 But in the very basic one, the cable operator pays a
3 certain percentage of his gross receipts for the first
4 DSE. I can't remember what it is, but it's a
5 percentage of his gross receipts. He pays a smaller
6 percentage of his gross receipts for the second,
7 third, and fourth DSEs. So for this one, he would pay
8 the highest percentage. For 1.75, he would pay the
9 next highest percentage. In the case, let's just say
10 in our hypothetical that he had carried five DSEs, he
11 would have paid by even a third lower percentage for
12 all DSEs over four.

13 So then you just do the percentage
14 calculation. You add up the royalties on each line.
15 Total it. That's the royalty fee calculation.

16 Q Why did Congress make this distinction
17 between the independents and networks?

18 A The reason has to do with the broadcast
19 day and the source of the programming. In terms of
20 independent stations, independent stations have to
21 acquire all of their programming. They either have to
22 acquire it or they have to produce it on their own.

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1 So we say that 100 percent of the broadcast day is
2 compensable.

3 In terms of network-affiliated stations,
4 it is the general assumption that 75 percent of the
5 broadcast day of a network affiliate, and again by
6 network I mean ABC, CBS, and NBC, is fed to it by the
7 network. The programming aired by the networks has
8 been licensed for national consumption, national
9 distribution. So there is the perception that
10 everyone in the United States has access to NBC, ABC,
11 CBS network programming, and that no copyright holder
12 has been harmed because of a new set of eyeballs
13 watching it.

14 The other 25 percent of the broadcast day,
15 the station either has to produce programming for or
16 acquire programming for. It is that quarter of a day
17 for which these royalties are made available.

18 Q So what is at issue now is royalties for
19 non-network programming?

20 A That's right.

21 Q Now let's switch our perspective around
22 from the cable operator.

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1 A (No response.)

2 CHAIRPERSON CAMPBELL: Before we do that
3 let us take a five minute break. I think everybody
4 could stand, get up, walk around, grab a glass of
5 water. Thank you. We'll be right back in about five
6 minutes.

7 (Off the record.)

8 CHAIRPERSON CAMPBELL: We will go back on
9 the record. We'll have a break from time to time as
10 the proceedings go on so that we can be as fair as
11 possible to whomever is involved.

12 ARBITRATOR DAVIS: Excuse me, we're going
13 to have to come up with designations for these charts
14 too, so we know which chart is referred to on the
15 transcript.

16 CHAIRPERSON CAMPBELL: Let's go back off
17 the record.

18 (Off the record.)

19 CHAIRPERSON CAMPBELL: Return from the
20 break and Mr. Popham and Ms. Kessler?

21 MR. POPHAM: Thank you.

22 BY MR. POPHAM:

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1 Q Now shifting the perspective as we're
2 doing from the Cable Operator to the Copyright
3 Owner/Claimant, can you describe the process by which
4 a Program Producer/Distributor claims royalties have
5 been paid by Cable Systems?

6 A Certainly. The very first thing that a
7 Claimant has to do is file a claim. That is done, as
8 I was explaining earlier, in July of the year after
9 the broadcast took place. So, for example, this
10 coming 2001, companies will file their claims for
11 Calendar 2000. Back in 1998, July of 1998. Claimants
12 filed their claims for Calendar 1997.

13 Q What happens after claims are filed?

14 A After the filing period, I go over to the
15 Licensing Division which is -- it's not behind that
16 wall, but it's close, and look at all of the companies
17 who file claims and I send them offers of
18 representation.

19 Q In terms of the general process though,
20 what process does the Copyright Office undertake to
21 ascertain what to do with the royalties?

22 A I understand. The royalty process has

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1 what we call two phases, Phase I and Phase II. If you
2 look at page 2 of my testimony, you will see the two
3 groups described.

4 Phase I has to do with the allocation of
5 royalties between eight claimant groups. I've listed
6 the eight there. There's the Program Suppliers
7 represented by MPAA. Sports, broadcasters, public
8 broadcasting, Canadian Claimants, Devotional
9 Broadcasters, music and NPR.

10 With respect to 1997, well, with respect
11 to any year, Phase I can go in any -- of several ways.
12 There is the possibility, the happy possibility that
13 we all settle and avoid litigation and if that doesn't
14 happen, sometimes we reach partial settlements and
15 litigate part of it. Or sometimes we have a full
16 blown litigation. The outcome of that is that the
17 CARP Panel assigns percentage shares to each of the
18 eight groups.

19 Phase II addresses disputes within a
20 category. In terms of 1997, there were six competing
21 parties to Phase II Programs Suppliers share. In
22 addition to the MPAA group, there was Home Shopping

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1 Network, representing by Mr. Lutzker here. Television
2 Station KNLJ, Tyrone Productions, NAB and the
3 Independent Producers Group. We settled with all
4 parties except IPG.

5 Q Thank you. Now shifting our perspective
6 yet one more time to that of MPAA, what is MPAA's role
7 in the distribution of cable royalties?

8 A We represent since 1978, since the
9 inception of the Act, we have represented all Program
10 Supplier Claimants, either in settlement discussions
11 or in litigation with respect to the allocation of
12 cable royalties and satellite carrier royalties.

13 Q And does MPAA file claims for the
14 companies it represents?

15 A No, we do not.

16 Q What other role then does MPAA play in the
17 process of negotiation over distribution of royalties
18 or what role has it played?

19 A I'm not sure what you're asking me.

20 Q Well, once we reach -- once the claims
21 have been filed, and you said you go and you check out
22 who the Claimants are, just MPAA as an organization,

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1 what role does it undertake from that point to the
2 point we might be today?

3 A I understand. Like I said, as a result of
4 Phase I, a percentage share of the fund is awarded to
5 each of the eight groups.

6 MPAA takes the share that has been
7 assigned to Program Suppliers and we allocate it to
8 our Claimants according to our distribution
9 methodology.

10 Q Now does MPAA play a role in any
11 controversies over in Phase I?

12 A We certainly represent all Program
13 Supplier Claimants with respect to Phase I. So I
14 would say the six groups listed on page 2 got the
15 benefit of MPAA representation prior to Phase II
16 activities.

17 Q Now could you just generally characterize
18 the types of Claimants that MPAA represents?

19 A We have, I don't want to say everybody,
20 but we certainly have a wide variety of Claimants. We
21 have studios with thousands, possibly tens of
22 thousands of titles in their libraries. We have

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1 animation companies. We have producers of children's
2 programming. We have people who own one or two
3 titles. In terms of big and little, as you were
4 talking about as you opened, we have big and we have
5 little and everybody in between.

6 Q And once the amount of royalties that is
7 due to MPAA represented Program Suppliers is
8 determined, how does MPAA distribute the royalties?

9 A If you'll look at page 8, I think, of my
10 testimony, you will see a discussion of something that
11 we call household viewing hours.

12 Household viewing hours is a calculation
13 that was developed that takes into account both the
14 amount of time that a program was broadcast and the
15 amount of time it was exposed or viewed or consumed by
16 the distant signal public.

17 Q How long has MPAA been using this
18 basically?

19 A I'm pretty sure it was not used for 1978
20 which was the first year. I'm almost positive it was
21 first used for 1979 and we have used it as our
22 distribution methodology for every year since 1979.

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1 CHAIRPERSON CAMPBELL: Can I ask a
2 question?

3 THE WITNESS: Certainly.

4 CHAIRPERSON CAMPBELL: Are we talking
5 about actual broadcast time versus the actual viewing
6 of that broadcast time? You're saying you take both
7 into account?

8 THE WITNESS: Take both into account and
9 I'll give it my best shot at describing how it works.

10 BY MR. POPHAM:

11 Q And we will come to that in a bit in more
12 detail.

13 If the involved Program Suppliers does not
14 file the valid timely claim, what does MPAA do?

15 A We don't do anything. We go to the
16 Copyright Office and see the companies who have filed
17 valid claims and we work with that set of companies.

18 Q And about how many Claimants does MPAA
19 represent for the 1997 cable royalties?

20 A I think there are 112 companies listed in
21 my Exhibit 1.

22 Q I would refer you, Ms. Kessler, then to

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1 your Exhibit 1, that is a list of the companies, I
2 believe, with one correction that MPAA represents. Is
3 that correct?

4 A That's right.

5 Q Ms. Kessler, I think you are aware that
6 some questions have been raised about MPAA's
7 representation of some of the Claimants in terms of
8 mergers and rep. agreements and what have you.

9 Could you tell us the status of Atlantis
10 Communications, Inc. and Alliance International
11 Releasing Ireland?

12 A Certainly. If you look at Exhibit 1, you
13 will see that we have indicated we represent both of
14 these Claimants, Alliance International Releasing
15 Ireland Limited and Atlantis Communications.

16 Both of those companies filed claims
17 during July of 1998 for shares of the royalty fund.
18 In the period that followed, it's my understanding
19 that Alliance was -- no, that Atlantis was acquired by
20 Alliance.

21 I corresponded with individuals at both of
22 those companies which are located in Canada and no one

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1 responded to our offers of representation.

2 As it turned out, the people with whom I
3 had previously corresponded were no longer working
4 there or were not the appropriate people and it took
5 a period of time for me to find the right individual
6 who turns out to be a fellow in London to advise me of
7 the circumstances regarding Atlantis and Alliance.

8 And I was instructed that the Atlantis
9 claim could be combined with the Alliance claim and I
10 would make one payment to the Alliance Company.

11 Q Now do you have any documentation to
12 confirm the relationship between Atlantis and
13 Alliance?

14 A I do. I have a letter that is not signed,
15 but I'm waiting for a signed copy of it. It may be at
16 my office right now.

17 Q I show this to Mr. Lutzker and Ms. Kessler
18 and CARP.

19 (The document referred to was
20 marked for identification as
21 MPAA Exhibit No. 10.)

22 (Pause.)

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1 This is marked, I believe, as MPAA Exhibit
2 10 now.

3 (Pause.)

4 CHAIRPERSON CAMPBELL: Mr. Lutzker, did
5 you have a question?

6 MR. LUTZKER: Yes. If I could. Again,
7 I'm not sure of our procedures here yet, but I mean my
8 intuition is I have an objection to a document that is
9 being introduced following the actions taken by the
10 CARP several weeks ago.

11 The document itself is dated December 20.
12 It is an unsigned document. If a signed document is
13 presented and authenticated, I would be able to deal
14 with that. As an unsigned document, I think it's
15 inappropriate to have testimony at this point.

16 Clearly, one of the obligations that was
17 imposed on MPAA in the course of the motions practice
18 that we had several weeks ago was to present
19 sustainable evidence. We had been clearly required by
20 procedures to have documents signed in writing, dated
21 and so forth and rather than having testimony on a
22 document that's unsigned, I would say that we should

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1 not have presentation at this point.

2 If the document does appear to be signed
3 at a later point, I would address it at that point,
4 but I think I would object to the introduction of this
5 document.

6 MR. POPHAM: And if I were Mr. Lutzker, I
7 would object to the introduction of an unsigned
8 document. We can defer testimony on it. We can have
9 testimony on it and then wait to move admission until
10 we have a signed document and we're happy to work
11 either way as I think -- the letter is probably
12 awaiting at --

13 THE WITNESS: The problem was Mr. Grinberg
14 was out of town. We have drafted the letter before he
15 went, I think, on a business trip. And it's my
16 understanding that he signed the letter on Friday and
17 that it was to be overnighted to me to be received
18 this morning, but of course, I left the office before
19 our mail had come in. I have every reason to believe
20 I will receive a signed copy.

21 CHAIRPERSON CAMPBELL: Why don't we do
22 this? Why don't we just mark it right now as Exhibit

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1 10, hold the discussion until such time as we can go
2 back to Exhibit 10 and have a true exhibit added, but
3 at least we'll know where it goes in the line of
4 exhibits.

5 Is that a problem, Mr. Lutzker? It will
6 be admitted. We'll just hold this because I think
7 what they're trying to do and I could be wrong on
8 this, at least keep some sort of order.

9 MR. LUTZKER: It may be that the document
10 never gets admitted.

11 CHAIRPERSON CAMPBELL: Well, if it
12 doesn't, then Exhibit 10 will be no document.

13 MR. LUTZKER: That's fine for immediate
14 purposes, as long as we defer any analysis or
15 conversation.

16 CHAIRPERSON CAMPBELL: That's what we just
17 said.

18 MR. LUTZKER: That's fine.

19 MR. POPHAM: In that light, we'll just
20 withhold further testimony on this.

21 CHAIRPERSON CAMPBELL: Until such time as
22 we have confirmation. We'll be taking a break at

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1 4:30. At that point I would want to know if you want
2 to go on further today. We have to meet with one of
3 the Copyright Office officials for 10 or 15 minutes,
4 but that would give you a chance to call your office
5 and see if it's there.

6 So perhaps let's just mark it, don't admit
7 it. We can all hold on that and move to the next
8 item.

9 BY MR. POPHAM:

10 Q Now Ms. Kessler, can you tell us the
11 status of Big Ticket Television?

12 A Certainly. If you refer again to Exhibit
13 1, you will see that we have listed the following
14 companies as MPAA represented. Big Ticket, which is
15 listed on page 1. Page 3, Spelling Television, Inc.
16 Also on page 3, Paramount Pictures, a Viacom Company
17 and the very last company listed on page 4,
18 Worldvision Enterprises, Inc. All four of these
19 companies filed timely claims at the Licensing
20 Division and we represented, we executed
21 representation of groups -- I can't speak. We
22 executed representation agreements with all of them

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1 except Big Ticket. Big Ticket and World Vision were
2 subsidiaries of Spelling Television. Spelling and its
3 subsidiaries were acquired by Paramount.

4 When I sent out the representation
5 materials, I didn't get anything back from Paramount
6 for Big Ticket and so I said why didn't I get a rep.
7 agreement for Big Ticket and he said you can process
8 the claim under the Worldvision rep. agreement.

9 And let me just -- I don't think I've
10 talked about this yet, but the purpose of the
11 representation agreements is for companies to
12 understand the methodology by which their royalty fees
13 will be calculated as well as some other information.
14 So I felt confident in including Big Ticket with the
15 Worldvision claim because all the companies had filed
16 claims and all of the participants understood the
17 methodology and agreed to it.

18 Q And Ms. Kessler, you have -- do you have
19 any documentation confirming what's happened with Big
20 Ticket?

21 A Yes, I do.

22 Q We have a document that's been provided to

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1 Ms. Kessler and now to the Panel and to Mr. Lutzker.
2 It's a letter dated December 18, 2000 to Marsha E.
3 Kessler from Cortez Smith, Vice President, Business
4 Affairs and Legal Domestic Division at Paramount
5 Pictures.

6 I ask that that be identified, marked for
7 identification as MPAA Exhibit 11.

8 (The document referred to was
9 marked for identification as
10 MPAA Exhibit No. 11.)

11 Ms. Kessler, can you tell us what that
12 letter says in pertinent part?

13 A Yes. I'm looking at the second paragraph
14 and the third line. Big Ticket and Worldvision
15 Enterprises, Inc. are wholly-owned subsidiaries of
16 Spelling Entertainment Group, Inc.

17 On June 23, 1999, Spelling Entertainment
18 Group became a wholly-owned subsidiary of Viacom
19 International, Inc. Viacom also owns Paramount
20 Pictures and Paramount now administers the affairs of
21 Big Ticket Television and Worldvision Enterprises.

22 Q Thank you. We'd ask that the document

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1 marked as MPAA Exhibit 11 be admitted into the record.

2 CHAIRPERSON CAMPBELL: Mr. Lutzker, any
3 objections?

4 MR. LUTZKER: I think I have an objection.
5 The represented Claimant is Spelling Television, Inc.
6 Big Ticket is described as a subsidiary of Spelling
7 Entertainment Group, Inc. Under procedures and
8 analysis that the CRT and CARP have dealt with in the
9 past, the claim by a parent may embrace the subsidiary
10 companies, but it's my understanding and Jim can
11 correct me if I'm wrong on this point, that a
12 subsidiary's claim cannot embrace other subsidiaries
13 unless they are separately identified in the claim and
14 if the Claimant is indeed, I don't have the claim
15 forms with me, but going off of Exhibit 1, if Spelling
16 Television, Inc. was the Claimant which may be a
17 different -- it would appear to be a different entity
18 than Spelling Entertainment Group, and if Big Ticket
19 were a subsidiary of the Entertainment Group, but not
20 the Television, Inc., certainly a question would be
21 raised in my mind.

22 I mean, as to the document itself, which

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1 would then be used to sort of close the deal on Big
2 Ticket status, it would seem to me to be prejudicial
3 to the extent it does not reference the specific
4 Claimant who is the parent of Big Ticket.

5 MR. POPHAM: It does indicate that Big
6 Ticket is the wholly-owned subsidiary of Spelling
7 which in turn is a wholly-owned subsidiary of Viacom.

8 CHAIRPERSON CAMPBELL: I think the issue
9 that's being raised is Spelling Entertainment Group,
10 Inc. versus Spelling Television, Inc., whether or not
11 those are two separate entities.

12 MR. LUTZKER: They would appear to be
13 separate corporate entities.

14 CHAIRPERSON CAMPBELL: It might be that we
15 need to allow since your testimony won't be finished
16 today, to allow you to contact Cortez Smith and find
17 out what the chain of title there is so it is
18 clarified.

19 MR. LUTZKER: I would be happy to do that.

20 CHAIRPERSON CAMPBELL: And particularly
21 corporations that are that sizeable sometimes it's
22 just a matter of clarification to determine whether

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1 this is, in fact, the clear chain of title or not.

2 MR. LUTZKER: I would also just remark
3 about the letter. The letter speaks to June 23rd that
4 Spelling Entertainment Group became a subsidiary of
5 Viacom. Obviously, we're dealing with claims filed in
6 1998 and if there is a relationship -- the
7 relationship between Big Ticket and Spelling
8 Television and Viacom is just -- it's not clear in
9 this document and further clarification, obviously,
10 would be necessary in our view.

11 MR. POPHAM: I hate to think we might be
12 drawing more pictures again about this, but we can
13 certainly clarify that.

14 CHAIRPERSON CAMPBELL: One moment, please.

15 (Off the record.)

16 CHAIRPERSON CAMPBELL: All right, back on
17 the record here. In view of the very large corporate
18 body that Viacom has now created for itself and the
19 fact that there are some questions about who filed,
20 when filed, when were they a part of this, when were
21 they a part of that, we would prefer, though this
22 Exhibit 11 is in the record, questions remain, viable

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1 questions remain with regard to the chain of title and
2 we would recommend that the representatives for MPAA
3 contact Cortez Smith and get an affidavit that
4 clarifies the chain of title with regard to the
5 corporations at issue here. And I think that being
6 Cortez is a corporate officer and has been involved
7 with both the corporate legal department and the
8 business affairs legal department, that affidavit
9 should bear the weight that it appears to be needed at
10 this moment with regard to those issues.

11 ARBITRATOR COOLEY: I just have a
12 clarifying question.

13 Ms. Kessler, is Mr. Cortez a lawyer?

14 THE WITNESS: You know, I believe he is,
15 but I don't know that for a fact.

16 CHAIRPERSON CAMPBELL: I don't know that
17 for a fact, but generally in a corporate and legal
18 department of a corporation, a vice president would be
19 a lawyer.

20 So that is a matter that will be
21 outstanding until corrected, if corrected by MPAA.

22 Mr. Lutzker, does that satisfy you at this

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1 point?

2 MR. LUTZKER: That's fine.

3 CHAIRPERSON CAMPBELL: Thank you.

4 BY MR. POPHAM:

5 Q Ms. Kessler, can we now address the status
6 of two entities, All-American Goodson and All-American
7 Television. Can you tell us the status of their
8 claims and relationships to MPAA?

9 A Yes, I can. All-American Goodson and
10 All-American Television each filed a timely claim for
11 its share of royalties.

12 By the way, these companies are now owned
13 by Pearson Television, but at the time they were
14 All-American Television and All-American Goodson.

15 Even though I would certainly for the
16 royalty process to flow smoothly and everyone obey all
17 of my deadlines for getting documents in, that doesn't
18 always happen and this is what happened in the case of
19 All-American and All-American Goodson. I sent out the
20 representation agreements and received no response
21 from them. But it's a company that I've worked with
22 for not 20 years, but certainly 15 plus years and with

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1 their predecessor company which was LBS.

2 I had every reason to believe that they
3 wanted MPAA representation, but they just have not
4 gone through the activity of signing the
5 representation agreement. Because of the
6 long-standing relationship with the company and
7 because I believed that we would get a representation
8 agreement from them, I listed them as represented
9 companies.

10 In fact, we did receive representation
11 agreements from them, I'm sorry, from All-American
12 Television.

13 Q And was there anything else to be said
14 about All-American Goodson?

15 A Yes. All-American Goodson made an error
16 in its claim. The program for which it claimed
17 royalties is a network program and as I explained
18 earlier, the network programming is not compensable so
19 the claim -- there's no claim. There's no money.

20 Q And again, do you have any documentation
21 to confirm the on-going relationship of MPAA with
22 All-American Television, All-American Goodson?

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1 A Yes, I do.

2 Q I'm showing Ms. Kessler a document
3 consisting of nine pages. I ask that it be marked as
4 MPAA Exhibit 12 and provide copies to the Panel and
5 Mr. Lutzker.

6 (The document referred to was
7 marked for identification as
8 MPAA Exhibit No. 12.)

9 The document consists of a number of
10 representation agreements, the top one being between
11 All-American Television and MPAA, executed
12 All-American Television on September 8, 1997 for 1992,
13 1993 and 1994 satellite royalties.

14 The second page is a representation
15 agreement-cable between All-American Television and
16 MPAA executed by All-American Television on May 23,
17 1996 for 1994 cable royalties.

18 Page 3, another representation
19 agreement-cable between All-American Television and
20 MPAA, executed by All-American Television on June 16,
21 1994 for 1992 cable royalties.

22 Page 4, another representation

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1 agreement-cable between All-American Goodson and MPAA,
2 signed January 20, 2000 for 1997 and 1998 cable
3 royalties, a two-page document on page 4 and 5.

4 Page 6, another representation
5 agreement-cable between All-American Television, Inc.
6 and MPAA, dated January 20, 2000, consisting of two
7 pages marked 6 and 7 for cable royalties in the years
8 1997, 1998.

9 Page 8, consists of another representation
10 agreement-cable between All-American Television, Inc.
11 and MPAA, signed by All-American Television on
12 September 24, 1997 for cable royalties for 1995 and
13 1996.

14 Finally, page 9, a representation
15 agreement-cable between All-American Goodson and MPAA,
16 signed September 24, 1997 for cable royalties for the
17 years 1995 and 1996. These are all to substantiate
18 the on-going relationship between MPAA and the
19 entities involved.

20 Ms. Kessler, are these the documents that
21 you rely on?

22 A Yes, that's true.

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1 Q I ask that these be admitted as MPAA
2 Exhibit 12.

3 A I guess that I would just remark that the
4 representation agreements that cover 1997 also cover
5 1998, so not only did I have the on-going relationship
6 with them in the past and I have a relationship with
7 them moving into -- what for us is the future, 1998.

8 MR. LUTZKER: No objection.

9 CHAIRPERSON CAMPBELL: Thank you, Mr.
10 Popham.

11 (The document referred to,
12 having been previously marked
13 for identification as MPAA
14 Exhibit No. 12 was received in
15 evidence.)

16 BY MR. POPHAM:

17 Q Moving right along, Ms. Kessler, in the
18 perspective of MPAA, what is the status of Lacey
19 Entertainment?

20 A Lacey Entertainment is listed in our
21 Exhibit 1. Lacey Entertainment filed a timely claim
22 with the Copyright Office and it executed a

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1 representation agreement with MPAA.

2 Q And Ms. Kessler, I'm going to show you a
3 document and I ask that it be marked as MPAA Exhibit
4 No. 13.

5 (The document referred to was
6 marked for identification as
7 MPAA Exhibit No. 13.)

8 It consists of three pages, a cover letter
9 to Brian Lacey, dated November 4, 1999 from Marsha
10 Kessler, followed by a representation agreement-cable
11 executed by Lacey on October 22, 1999 for cable
12 royalties years 1997 and 1998.

13 A related document which we would offer --
14 ask that it be marked as MPAA Exhibit 14, a letter in
15 memo form of April 5, 2000 to Marsha Kessler from
16 Brian Lacey.

17 We'll make a copy available to Ms. Kessler
18 and Panel and Mr. Lutzker.

19 (The document referred to was
20 marked for identification as
21 MPAA Exhibit No. 14.)

22 (Pause.)

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1 And Ms. Kessler, looking to the document
2 marked as MPAA Exhibit 14, April 5 letter from Mr.
3 Lacey, could you read the three paragraphs of that
4 letter, please?

5 A Yes. The first paragraph says, "Worldwide
6 Subsidy Group is not authorized to represent Lacey
7 Entertainment for the filing and collection of any
8 U.S. cable retransmission royalties for any of Lacey's
9 programs."

10 Number 2. "Lacey Entertainment is not the
11 U.S. distributor or syndicator of the series
12 "America's Dumbest Criminals" and thus it has not
13 authorized Worldwide Subsidy Group to file and attempt
14 to collect U.S. cable retransmission royalties."

15 3. "MPAA is authorized to represent Lacey
16 Entertainment for the filing of U.S. cable
17 retransmission royalties, specifically for the "Mr.
18 Men Show" and "Mega Man."

19 And it's signed by Brian Lacey who I
20 believe is the President of Lacey Entertainment.

21 Q Ms. Kessler, are these the documents you
22 relied on in including Lacey Entertainment in MPAA's

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1 claim?

2 A Yes, they are.

3 MR. LUTZKER: At this point I'd like to
4 interpose an objection to both Exhibit 14 and Exhibit
5 13 at least with respect to the cover letter. The
6 document -- I'll start with Exhibit 13, the letter
7 dated November 4, 1999 which comes from Ms. Kessler to
8 Mr. Lacey. In our view, was a document, if it existed
9 at the time as this purports to be, it should have
10 been provided in discovery. This, I believe, is the
11 first time we have seen this document as is the first
12 time we have seen the letter memorandum document. If
13 it were a part of -- we had asked for correspondence
14 and communications from the MPAA to all Claimants they
15 represented and there was a clear response in
16 connection with our discovery request that indeed
17 there was no correspondence between MPAA and any of
18 the Claimants. Clearly, a document dated April 5 and
19 a document dated November 4 were well embraced within
20 the discovery period and on that basis we would object
21 to their introduction at this point.

22 MR. POPHAM: First of all, in terms of the

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1 April 5 letter, it was subject to confirmation, I
2 believe we may have attached that to a pleading that
3 was filed somewhere in the process over the long-time
4 debate with IPG over Lacey.

5 CHAIRPERSON CAMPBELL: Excuse me, Mr.
6 Olaniran?

7 MR. OLANIRAN: I was going to mention, I
8 think the Exhibit 13, I'm sorry, Exhibit 14 was
9 attached to our original motion to dismiss which was
10 filed, I think, on May 17th in this proceeding.

11 CHAIRPERSON CAMPBELL: Yes. I think that
12 was the date.

13 MR. POPHAM: And the representation
14 agreement would have been recently provided in
15 connection with the update and correction of Ms.
16 Kessler's testimony. It was an underlying document.

17 MR. LUTZKER: First, with respect to
18 Exhibit 14, no correspondence was submitted in
19 response to discovery at any point during the course
20 of this proceeding.

21 There was a letter, a different letter,
22 it's my recollection, that was attached to a separate

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1 filing from counsel, but there was never a response to
2 a discovery request and I will be able to, if I have
3 a moment or two both locate the prior letter that was
4 part of the documents and separately I will identify
5 the responses from Ms. Kessler's answer to discovery
6 that no correspondence existed.

7 I would also object to the extent, we have
8 here, it is a letter from Mr. Lacey that has -- that
9 was submitted not in response to discovery, but as an
10 attachment to a Motion to Dismiss that was provided
11 and appears to be a fax document that is different,
12 does not contain item 3 in this letter, so the
13 authenticity of this letter and -- where this arrives
14 from is -- a question is obviously raised.

15 But under any circumstances, under any
16 circumstances to suggest that this material should be
17 provided now in an amendment to the case, I don't know
18 if there's any amendment with respect to Mr. Lacey's
19 programming that is being suggested by this. These
20 documents should have been provided a long time ago
21 and they cannot be introduced now, having failed to
22 have done that.

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1 MR. POPHAM: I think the representation
2 agreement is by no means a particularly unusual
3 document, nor is the fact that there has been a
4 contest over these particular titles so I don't know
5 if there a tremendous element of surprise here for Mr.
6 Lutzker.

7 I apology that this is not the same
8 letter. Perhaps we should introduce the other letter,
9 but I do believe this representation agreement, 13 in
10 particular, is certainly evidence of the fact that Ms.
11 Kessler included this in her claim. And Lacey has
12 been included, I believe in our claim since Day 1. I
13 don't believe Mr. Lutzker is disadvantaged if he did
14 not get this until perhaps recently.

15 MR. LUTZKER: I am not objecting to the
16 introduction of the representation agreement with Mr.
17 Lacey because that was a document provided previously
18 in this proceeding to us as part of discovery. It
19 was, in fact, one of the original documents provided
20 in the course of discovery.

21 However, with respect to the other
22 portions of the documents, I would object, I would

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1 object to not only Ms. Kessler reading the document
2 into the record which she proceeded to do, but for the
3 MPAA to make any use of this material at this point in
4 time is not appropriate. In other words, if they had
5 these documents for months and in some cases over a
6 year, why on earth wasn't it provided, but instead
7 responses to interrogatories, to document requests
8 with respect to providing documents between MPAA and
9 Claimants indicates that there is no correspondence.
10 That is their response, there is no correspondence.

11 CHAIRPERSON CAMPBELL: Excuse me, Mr.
12 Lutzker, what is the date of that document request you
13 just mentioned?

14 MR. LUTZKER: Well, the document requests
15 were made -- April 13th, responses were made April
16 19th. Documents were provided -- of 2000. Documents
17 were then provided subsequent to that date and I don't
18 think there is any question -- Mr. Olaniran can
19 respond, that these documents had not been provided to
20 date, neither of these documents. And when I say the
21 documents, I'm considering it three documents, the
22 representation agreement aside. I'm not objecting to

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1 the introduction of that document.

2 MR. POPHAM: Just so I'm clear, the
3 objection goes to the cover letter of November 4 and
4 to the April 5, 2000 letter.

5 Could we ask Mr. Lutzker to specify the
6 particular document request that you referred to?

7 MR. LUTZKER: I will provide it.

8 (Pause.)

9 CHAIRPERSON CAMPBELL: In view of our time
10 and the fact that the three of us on the Panel want to
11 take the objections and the efforts to bring any
12 exhibits into some discussion and clear evaluation, we
13 will do this. We will adjourn today. The three of us
14 will meet tonight and we will come back tomorrow
15 morning at 9:30. That way we will have full and fair
16 opportunity to debate this as well as the implication
17 for this for the rest of the hearing and both parties
18 will have a chance to sift through some of the
19 materials they've been wanting to sift through in
20 order to get prepared for the rest of the testimony.
21 You'll be able to check your office, Ms. Kessler, and
22 I think we can start afresh in the morning and move

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1 forward with great speed and diligence.

2 Do we have a question from the Court
3 Reporter?

4 (Off the record.)

5 CHAIRPERSON CAMPBELL: Question for Mr.
6 Popham. Just looking forward, do you anticipate one
7 more day, a half a day, three quarters of a day, a day
8 and a half on this direct? Can you give us an idea
9 where we are in your train of thought here?

10 MR. POPHAM: I would anticipate, depending
11 on how much time we have to deal with matters such as
12 objections and what have you, that half a day would be
13 plenty.

14 CHAIRPERSON CAMPBELL: Very good, very
15 good.

16 Mr. Olaniran?

17 MR. OLANIRAN: I'm still not sure we're
18 clear on the specific discovery request that Mr.
19 Lutzker was referring to and we need to know that so
20 that we can adequately ascertain whether we, in fact,
21 responded, because if the discovery request pertains
22 to a question about whether we're representing Brian

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1 Lacey, we did provide documents to that effect.

2 I don't know which request he's referring
3 to with respect to his objections and that hasn't been
4 made clear year.

5 MR. LUTZKER: We will make that further
6 clear, but -- and I'll coordinate with counsel on that
7 point.

8 CHAIRPERSON CAMPBELL: All right, is that
9 satisfactory with you?

10 MR. OLANIRAN: That's fine.

11 CHAIRPERSON CAMPBELL: Great. And I had
12 one clarification with regard to Mr. Olaniran's firm.

13 Are you staying in as representation, but
14 just not during the witness testimony or have you
15 withdrawn?

16 MR. OLANIRAN: No, I have not withdrawn.

17 CHAIRPERSON CAMPBELL: Okay, I wanted to
18 make that clear for the record.

19 MR. OLANIRAN: I'm on the case.

20 CHAIRPERSON CAMPBELL: Very good, very
21 good.

22 And I thank you all for coming and plowing

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1 through today. We will see you again tomorrow at 9:30
2 and we are now adjourned.

3 Thank you.

4 (Whereupon, at 4:24 p.m., the hearing was
5 recessed to reconvene tomorrow, Tuesday, January 9,
6 2001 at 9:30 a.m.)

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the matter of: Oral Arguments:
Distribution of 1993, 1994, 1995,
1996 and 1997 Cable Royalty Funds,
Docket No. 2000-2 CARP CD 93-97

Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: January 8, 2001

Place: Washington, DC

represents the full and complete proceedings of the
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